Petition

No. 81-1288

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In the Supreme Court of the United States

OCTOBER TERM, 1981

BRUNSWICK CORPORATION and MARINER CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION and YAMAHA MOTOR COMPANY, LIMITED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did not the United States Court of Appeals for the Eighth Circuit err in affirming Orders of the Federal Trade Commission which held that a limited-term joint venture between petitioners and a Japanese company violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the joint venture removed the Japanese company as an "actual potential entrant" into the outboard motor market in the United States?

2. Should this Court now resolve the issue on which it reserved judgment in *United States* v. *Marine Bancorporation*, 418 U.S. 602 (1974), and *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), namely whether Section 7 of the Clayton Act prohibits an arrangement which does not lessen existing competition in the marketplace but may preclude entry by an "actual potential entrant"?

3. Assuming the "actual potential entrant" theory to be permissible, did not the Eighth Circuit err in refusing to require the FTC to give weight to factors which the Second, Fourth and Fifth Circuits have regarded as essential in determining whether the elimination of a particular "actual potential entrant" would violate Section 7?

4. Even if the joint venture was unlawful, should not the Eighth Circuit have set aside the FTC's Final Order which not only required that one joint venturer transfer

its interest to the other but also directed that the transfer be at a windfall price?'

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[1] All of the parties to the proceeding in the court below are identified in the caption of the case in this Court. Mariner Corp. is a wholly-owned subsidiary of Brunswick Corporation. Brunswick also has ownership interests in, or is affiliated with, the following companies:

Wayne Recreation Center Lounge, Inc., Devils Lake Sioux Mfg. Corp., Nippon-Brunswick K.K., Sanshin Industries Co-Ltd., Marine Power-France, S.A., Brunswick GMBH, Nihon Regulator Company, Ltd., Nippon-Sherwood Medical Industries, Ltd., Enhanced Energy Systems, Inc., and Sugita Siesakusaho Co. Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brunswick Corporation and Mariner Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on July 29, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals (which appears in the Appendix at App. 1) is reported at 657 F.2d 971. The Federal Trade Commission's Opinion and Order on the question of remedy (which appears in the Appendix at App. 29) are reported at 96 F.T.C. 151 (1980). The Findings and Recommendations of the Administrative Law Judge concerning remedy (which appears in the Appendix at App. 47) are not reported. The Federal Trade Commission's Opinion and Order denying the motion to disqualify counsel (which appears in the Appendix at App. 78) are not reported. The Federal Trade Commission's Opinion on the violation question (which appears in the Appendix at App. 95) is reported at 94 F.T.C. 1253 (1979). The Initial Decision of the Administrative Law Judge (which appears in the Appendix at App. 137) is reported at 94 F.T.C. 1179 (1977). The Judgment and Order of the Court of Appeals denying Brunswick's Petition for Rehearing and Suggestion for Rehearing En Banc appear in the Appendix at App. 260, 262.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1981. A timely petition for rehearing and suggestion for rehearing in banc was denied on September 11, 1981. On November 25, 1981, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including January 11, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1), as they existed when the proceeding was instituted before the Federal Trade Commission, read as follows:

Section 7 of the Clayton Act.

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Section 5(a)(1) of the Federal Trade Commission Act.

> "Unfair methods of competition in or affecting commerce . . . are declared unlawful."

STATEMENT

1. This petition seeks to bring before this Court an issue on which the Court expressly reserved judgment in *United States* v. *Marine Bancorporation*, 418 U.S. 602, 639 (1974), and *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973), that is, whether Section 7 of the Clayton Act prohibits an arrangement (in this case a joint venture) which does not lessen existing competition in the marketplace but may preclude entry by an "actual potential entrant." The issue arose in a Federal Trade Commission ("FTC") proceeding which had been tainted by the misconduct of the FTC Complaint Counsel and the relationship that developed between that Complaint Counsel and counsel for Yamaha Motor Company, Limited ("Yamaha"), nominally a co-respondent in the FTC proceeding. Following the misconduct, the FTC held the joint venture between petitioners and Yamaha to have been in violation of law, but it fashioned a "remedy" that would severely punish petitioners and, at the same time, place Yamaha in a much better position than if it had never entered into the supposedly unlawful joint venture.

In addition to presenting the fundamental legal issue as to the validity of the "actual potential entrant" theory, the case also raises important questions as to the approach to be taken by courts of appeals in reviewing FTC decisions in this area. The standards used by the Court of Appeals for the Eighth Circuit in this case are in conflict with those used by other courts of appeals which have had occasion to review "actual potential entrant" decisions. The need for uniformity of approach among the circuits is particularly imperative in this area of the law since a single business arrangement that may be challenged by the FTC may be subject to review in several, often all, of the circuits; and, of course, businessmen rarely know the identity of the reviewing circuit in advance of entering into their business arrangements.[1]

[1] In this very case, Yamaha and Petitioners took appeals to different Courts of Appeals on the same day and the choice of circuit turned solely on the fact that the Clerk's office in one circuit opened for business a half hour earlier than the Clerk's office in the other circuit.

2. The significant issues presented by this case arise in the framework of the outboard motor industry in the United States.

Petitioner, Brunswick Corporation ("Brunswick"), a diversified manufacturer and marketer, entered the outboard motor industry in 1961 when it acquired what is now its Mercury Marine Division (App. 145-146).

For many years, the dominant company in the outboard motor industry has been Outboard Marine Corporation ("OMC") which markets both the "Johnson" and the "Evinrude" brands. In 1972, OMC had about 59% of the United States outboard motor market. Brunswick (through its Mercury Division) was a distant second, with a market share of approximately 24% at that time. Chrysler was third, with a 12% market share (App. 165).

Yamaha, a Japanese corporation, has been selling snowmobiles and motorcycles since 1961. While Yamaha sold a limited line of outboard motors in certain parts of the world, no Yamaha outboard motors were being sold in the United States in 1972. Except for two singularly unsuccessful attempts to enter the United States outboard motor market on a limited basis in 1968 and 1971-72, Yamaha stayed away from the United States market.[2] The Yamaha marketing organization was convinced that Yamaha's outboard motors were not suitable for the United States market (App. 199-202).

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[2] Yamaha attempted to "enter" the United States outboard market in 1968 with 1700 low horsepower units, but that proved to be a dismal failure (800 units being returned to Japan as unsaleable and most of the others ending up collecting dust on the dealers' floors). Its second attempt to market small 1.5 horsepower units through Sears, Roebuck and Company in 1971-72 was equally unsuccessful (App. 188-89).

In 1969, Yamaha acquired 60% of the stock of a Japanese corporation known as Sanshin Kogyo Company, Limited ("Sanshin"). Since that time, Sanshin has produced all "Yamaha" brand outboard motors (App. 150).

While Yamaha had an interest in entering the American market prior to the joint venture agreement described below, Yamaha was convinced that it simply did not have a line of outboard motors that could be marketed in the United States and would not have such a line for the predictable future[3] (App. 202-07).

3. On November 21, 1972, Brunswick and Yamaha entered into a limited-term joint venture agreement. In contemplation of that agreement, Brunswick formed a wholly-owned subsidiary, Mariner Corporation ("Mariner"). Pursuant to the terms of the joint-venture agreement, Mariner acquired 38% of the stock of Sanshin, Yamaha's share in Sanshin also became 38% and the remaining 24% was held by individual Japanese shareholders (App. 147, 153).

Under the joint venture agreement, Sanshin (with technical assistance from Brunswick and Yamaha) was to produce identical outboard motors for sale under two brand names, "Yamaha" and "Mariner." Sanshin sold all

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[3] Yamaha's outboard motor line at the time of the joint venture was a relatively simple, low horsepower line, suitable for salt water and used primarily for commercial fishing and transportation Many parts of Yamaha's outboards were made of stainless steel to prevent corrosion in salt water use, and consequently, the Yamaha outboards were too costly to compete in the United States market. While the Yamaha outboards were suitable for work-oriented and less developed markets, Yamaha's 1972 line was not suitable for the significantly different, high performance and pleasure-oriented United States market. The 1972 low horsepower Yamaha line lacked the power and features which were common on outboard motors sold in the United States (App. 199).

these products to Yamaha, which in turn sold the "Mariner" motors to Brunswick-Mariner (App. 154, 207).

Yamaha's decision to enter into the joint venture with Brunswick-Mariner was based on Yamaha's knowledge that it could not profitably enter and operate in the United States market as a top class competitor without a full line of high performance recreational outboard engines that would appeal to American customers, and that it simply did not have such a full line. By entering into the limited-term joint venture, Yamaha was able to obtain from Brunswick the technological assistance and know-how (including patents and trade secrets) Yamaha needed to shorten the time within which it would be able to develop a suitable line of outboards to enter the United States market successfully (App. 200-02, 204-06). Brunswick, in turn, entered the joint venture because it wanted to sell a new and different line of outboard motors—the "Mariner" line—in world markets including the United States, but did not have the capital or plant capacity to do so on its own. Brunswick wanted to be able to market two distinct brands in a way that would enable it to challenge the dominance of OMC (App. 180, 182).

The joint venture agreement of November 21, 1972 provided that its initial term would be ten years, subject to three-year renewals unless either party gave written notice of termination three years before the end of the term. The ten-year term was suggested by Yamaha so that it would have an opportunity to re-evaluate the United States market and it shown capabilities as the joint venture and exchange of technology progressed (App. 154, 206, Trial Transcript 694).

4. On April 15, 1975, the Federal Trade Commission issued a complaint charging that the joint venture and ancillary agreements violated Section 7 of the Clayton

Act, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. Paragraph 28 of the complaint charged that the joint venture agreement substantially lessened competition in the United States outboard motor market "by eliminating Yamaha as one of a few likely entrants into the United States outboard motor market" (94 F.T.C. at 1179).

Evidentiary hearings commenced before James P. Timony, the Administrative Law Judge ("ALJ"), on October 5, 1976 and were concluded on December 21, 1976. The record before the ALJ consisted of 866 pages of testimony and 165 exhibits, many multi-paged (App. 144)

On May 2, 1977, the ALJ entered an Initial Decision (App. 137) which included 210 separate findings of fact (App. 145-212) and lengthy conclusions of law (App. 213-59). The ALJ's ultimate conclusion was that the joint venture and ancillary agreements did not violate Section 7 of the Clayton Act or Section 5 of the FTC Act. Therefore, he ordered that the complaint be dismissed (App. 259).

Complaint Counsel appealed to the full Commission. Prior to argument before the Commission, Complaint Counsel (Ronald Dolan) met ex parte with counsel for Yamaha. While the specific details of that meeting are not a matter of record, the record does demonstrate that, from that point forward, Yamaha abruptly changed its position in these proceedings.

The appeal was argued to the full Commission on November 3, 1977. At the argument, counsel for Brunswick-Mariner fully defended the ALJ's Initial Decision but counsel for Yamaha backed away, saying that Yamaha would remain neutral.

The matter remained pending before the Commission for over two years, during which two of the Commissioners who heard argument, Commissioners Collier and Dole, departed and were replaced by Commissioners Pitofsky, the author of the FTC's opinion in this matter, and Bailey.

5. On June 8, 1979, Complaint Counsel Dolan left the Commission to go into private practice. On July 2, 1979, Dolan commenced working for the law firm of Pettit & Martin. In September 1979, Dolan began openly to solicit representation of Yamaha for his new law firm. Dolan met with Yamaha's counsel of record on September 20, 1979 and had telephone contacts with him in September and October 1979 concerning the representation. In October, Dolan also furnished Yamaha's counsel with information on the likely date and holding of the FTC's opinion (App. 79-81).

6. On November 8, 1979 (November 9 Japanese time), Yamaha gave formal written notice to Brunswick and Mariner that Yamaha was exercising its right to terminate the joint venture agreement at the end of its current term (April 30, 1983) (App. 52).

7. Under date of November 9, 1979, the FTC handed down a decision reversing the ALJ (App. 95). The Commission held that the joint venture violated both Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because it eliminated Yamaha as an actual potential entrant into the United States outboard market. In the course of its opinion, the FTC rejected the ALJ's finding that the pro-competitive effects of this limited-term joint venture outweighed any anti-competitive potentialities. Additionally, the FTC held that the evidence that the joint venture would terminate at the end of its initial ten-year term was "self serving"

and "uncabined speculation" (App. 130), a holding that seems bizarre in view of the events of the preceding day.[4] In any event, the Commission remanded the case to the ALJ for the receipt of additional evidence on the question of formulating an appropriate remedy (App. 136).

8. The Commission's decision did not become known to the parties until November 16, 1979. Four days later (November 20) Yamaha formally retained Dolan's law firm (Pettit & Martin) to represent it in these proceedings. Pettit & Martin entered its appearance for Yamaha on December 14, 1979, and continued to represent Yamaha in this case (App. 81).

9. On December 26, 1979, Brunswick moved the Commission to disqualify Pettit & Martin from representing Yamaha in this matter. By opinion dated February 22, 1980, the Commission denied the motion, although it expressly recognized that Dolan's actions were clearly improper (App. 93-94).

10. On March 14, 1980, the ALJ made his recommendations on the question of remedy. On August 14, 1980, the FTC entered a final order which, *inter alia*, directed Brunswick and Mariner to sell all of their stock in Sanshin to Yamaha for a price equal to the value of the net tangible assets per share (App. 44).

11. On appeal in the Eighth Circuit, Brunswick-Mariner challenged (1) the holding of the FTC that Brunswick and Mariner had violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, (2) the remedy fashioned by the FTC which would

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[4] On November 30, 1979, Brunswick filed a motion to reopen and reconsider. The motion was denied by the Commission on January 15, 1980.

punish Brunswick-Mariner and give Yamaha an unmitigated windfall, and (3) the decision of the FTC on the disqualification question. Yamaha, on the other hand, did not challenge the FTC finding that Yamaha had violated Section 5 of the Federal Trade Commission Act by entering into the joint venture. However, Yamaha challenged the FTC holding that Yamaha had violated Section 7 of the Clayton Act (Yamaha being concerned about the effect that Section 5(a) of the Clayton Act, 15 U.S.C. § 16a, would give to any holding that Yamaha had violated the "antitrust laws"). The FTC thereupon advised the Court of Appeals that it was content to let its finding as to Yamaha rest solely on Section 5 of the Federal Trade Commission Act and that it was abandoning its holding that Yamaha had violated Section 7. The Court of Appeals let the matter rest in that fashion (657 F.2d at 983) (App. 22-23).

The Court of Appeals refused even to consider Brunswick's request that the Commission's order be set aside because of the misconduct of counsel, confining its comments to a brief footnote which concluded:

> ". . . We reject this request and do not choose to discuss it at any further length." 657 F.2d at 976 n.5 (App. 8)

Nor did the Court of Appeals evaluate the merits of the case before it in the light of that conduct.

On the merits, the Court of Appeals said that the issue before it was "simply whether the Commission acted within the zone of choice marked out by the substantial-evidence standard when it found that there would probably have been more competition without the joint venture than with it." 657 F.2d at 977-78 (App. 11 n.7). The court affirmed the Commission and, in so doing, upheld the "actual potential

entrant theory," refused to apply the restrictions on that doctrine enunciated by its sister circuits, and concluded, *inter alia*, that there was "subsantial evidence" in the record on which the Commission could base a conclusion that Yamaha was likely to have entered the United States outboard motor market on its own were it not for the joint venture.

REASONS FOR GRANTING THE WRIT

As we show below, this case involves important legal issues that should be, but have not been, decided by this Court. This is especially true here inasmuch as we are dealing in an area of the law where it is imperative that there be uniformity in the approach taken in the circuits since a particular business transaction might come up for review in any of the circuits. Coke's maxim, that "the known certantie of the law is the safetie of all," is particularly appropriate in this situation.

Moreover, there is a need to cleanse the proceedings in this case of the taint of impropriety that has permeated them in the past few years, a taint brought about by the relationship that developed between the prosecutorial arm of the FTC and counsel for Yamaha, a supposed respondent. As an apparent direct result of the ex parte contact that Complaint Counsel had with counsel for Yamaha during the period between the ALJ's Initial Decision and the argument before the full Commission, Yamaha took an increasingly ambivalent position; bearing the label "respondent," Yamaha became Complaint Counsel's amanuensis. Then when the same Complaint Counsel left the Commission to enter private practice, he openly solicited Yamaha's business, and Yamaha quickly became a client of the law firm he joined, which then represented Yamaha throughout all further proceedings. With the former Complaint Counsel's law firm now openly representing Yamaha, the Commission fashioned its "remedy" —an order which permitted Yamaha to achieve substantial benefits from its supposed misdeeds: all of the stock

in the joint venture, for a price consisting of nothing more than net-asset value, plus entry into the United States outboard motor market by virtue of the technology and trade secrets it had acquired from Brunswick as a result of the joint venture. The FTC then withdrew the one element of its decision that could have harmed Yamaha—the holding that Yamaha had violated Section 7 of the Clayton Act.

A. This Court Should Resolve the Issue on Which It Reserved Judgment in Falstaff and Marine Bancorporation.

The fundamental legal question presented in this case is, of course, the issue on which this Court has twice reserved judgment, namely whether Section 7 of the Clayton Act prohibits an arrangement which does not lessen existing competition in the marketplace but precludes entry by a company that might enter the market in the future—the so called "actual potential entrant."

By its terms, Section 7 proscribes only those acquisitions whose "effect . . . may be substantially to lessen competition." This Court has long-recognized that "§ 7 deals in 'probabilities,' not 'ephemeral possibilities.'" *United States* v. *Marine Bancorporation*, 418 U.S. 602, 622-23 (1974), *citing Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962).

Where both the acquired company and the acquiring company are active in the marketplace prior to the acquisition (*i.e.*, a true horizontal acquisition), the "lessening of competition" in that market is apparent and the only question is whether it is "substantial." This Court has also gone one step further and has held that Section 7 may be violated when the acquired company, while not

actually competing in the market, is perceived as a potential entrant by those in the market and is so situated as to be "likely to exercise substantial influence on market behavior." *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1972).

But this Court "has not squarely faced the question" (*Id.* at 537) whether Section 7 is violated by an arrangement which neither lessens existing competition in the marketplace nor eliminates a "perceived potential entrant," but simply precludes entry by a company that might enter the market sometime in the future. This Court recognized the problem in both *Falstaff* and *United States* v. *Marine Bancorporation*, 418 U.S. 602, 639 (1974), but specifically reserved judgment on the question in both cases, leaving it "for another day." *Falstaff*, 410 U.S. at 526.

Whether the elimination of such an "actual potential entrant" is proscribed by Section 7 is an important question—and one that has been percolating at the Commission and in the lower federal courts for the past decade.[5]

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[5] *See Mercantile Texas Corp.* v. *Board of Governors*, 638 F.2d 1255 (5th Cir. 1981); *Republic of Texas Corp.* v. *Board of Governors*, 649 F.2d 1026 (5th Cir. 1981); *United States* v. *Siemens*, 621 F.2d 499 (2d Cir. 1980); *BOC International Ltd.* v. *FTC*, 557 F.2d 24 (2d Cir. 1977); *FTC* v. *Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *United States* v. *Consolidated Foods Corp.*, 455 F. Supp. 108 (E.D. Pa. 1978); *Babcock & Wilcox Co.* v. *United Technologies Corp.*, 435 F. Supp. 1249 (N.D. Ohio 1977); *FTC* v. *Tenneco, Inc.*, 433 F. Supp. 105 (D. D.C. 1977); *United States* v. *Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976); *United States* v. *Hughes Tool Co.*, 415 F. Supp. 637 (C.D. Cal. 1976); *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579 (W.D. Pa. 1975); *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 375 F. Supp. 249 (S.D.N.Y.), *rev'd*, 498 F.2d 851 (2d Cir.), *cert. denied* 419 U.S. 883 (1974); *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974).

The question is one on which the text writers are divided.[6]

It was not until the decision in the instant case that any Court of Appeals specifically relied on the "actual potential entrant" theory to invalidate an acquisition. Compare the situation in the Fifth Circuit where, in two recent cases, that Court of Appeals assumed that, under some circumstances, an acquisition by an "actual potential entrant" might be unlawful, but remanded for additional findings as to requisites which, as we show below, were not established here. *Mercantile Texas Corp.* v. *Board of Governors*, 638 F.2d 1255 (5th Cir. 1981); *Republic of Texas Corp.* v. *Board of Governors*, 649 F.2d 1026 (5th Cir. 1981). With the Circuits approaching this problem in different ways, with the text writers divided, and with businessmen necessarily uncertain as to the circuit in which their transactions may be reviewed, it would appear to be the time for this Court to face squarely the question deferred in *Falstaff* and *Marine Bancorporation*.

B. The "Actual Potential Entrant" Theory Is Incompatible with the "Reasonable Probability" Standard of Section 7 of the Clayton Act and Does Not Comport with Either the Language or Legislative History of Section 7.

The "actual potential entrant" theory is incompatible with the "reasonable probability" standard established in *Brown Shoe* and *United States* v. *E.I. duPont de Nemours & Co.*, 353 U.S. 586, 607 (1957). By resting upon an assumption—that entry by a new firm into a concentrated market will create new capacity, exert downward

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[6] See discussion in *FTC* v. *Atlantic Richfield Co.*, 549 F.2d 289, 293-94 (4th Cir. 1977).

pressure on the price and make collusion more difficult[7]—and by requiring guesswork to satisfy each of its essential elements, the "actual potential entrant" theory blurs the distinction between speculation and reality. Where an acquisition has no adverse effect on present competition but at most eliminates a possible future entry which, in the normal course of events, might never happen at all, the effect of the acquisition is not something that can be forecast with reasonable probability.

The "actual potential entrant" theory comports with neither the language nor the legislative intent of Section 7. By use of the term "lessen" and by reference to "line of commerce", Section 7 of the Clayton Act signals a comparison between the probable post-merger level of competition and the existing pre-merger level.

Prior decisions of the Court suggest such a "before and after" analysis. For example, in *International Shoe Co.* v. *FTC*, 280 U.S. 291, 298 (1930), the Court found that the "acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected. . . ."[8] The House Report on the original Celler-Kefauver Act also confirms a "before and after" test. Section 7 was intended to reach "elimination in whole or in material part of the competitive activity of an enterprise *which has been a substantial factor* in competition . . . [or] undue reduction in the number of competing enterprises. . . ." H.R. Rep. No. 1191, 81st Cong., 1st Sess.

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[7] *See BOC International Ltd.* v. *FTC*, 557 F.2d at 27 & n. 5; Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 68 Harv. L. Rev. 1313, 1383-84 (1965).

[8] While Section 7 was amended following *International Shoe*, none of those amendments affects the Court's analysis in that case.

8 (1949) (emphasis added). But an acquisition involving an actual potential entrant "will leave competition in the marketplace exactly as it was, neither hurt nor helped." *United States* v. *Falstaff Brewing Corp.*, 410 U.S. at 537.

C. The "Actual Potential Entrant" Theory Should Not Be Used To Bar a Limited-Term Joint Venture.

Even if the "actual potential entrant" theory were accepted in the abstract, the very reasons which suggest validity also point to its inapplicability to certain types of transactions, such as the limited-term joint venture in controversy here.

A limited-term joint venture, in which valuable and proprietary trade secrets, technology, patents and know-how are exchanged, and thereby made available to companies who would not otherwise have had them, is fundamentally different from a merger which forever eliminates the prospect that the companies involved will become competitors. The limited-term joint venture offers significant pro-competitive benefits, strengthens both of the companies involved as competitors in world markets, and is likely to result in more competition than would otherwise have existed when the joint venture terminates.

For example, the Brunswick-Yamaha joint venture, which will expire in 1983, did not *eliminate* Yamaha from the market. To the contrary, it preserved and enhanced the probability of a *de novo* entry in the future by a company that was unable to enter the United States market independently because it lacked high horsepower engines and its existing product was not suitable for the United States market. The joint venture added a new brand to compete with OMC's "Johnson" and "Evinrude" brands and augmented competition in

the United States market at the dealer level. It also strengthened the ability of Yamaha and Mercury to compete in world markets. It benefitted American consumers by providing them access to new and better products at lower prices.

The Commission's conclusion, that these beneficial effects on competition were outweighed by the bare facts that Yamaha had achieved success in marketing other products and in marketing certain types of outboard motors in other nations and that Yamaha desired to enter the United States, rested on mere speculation. The Commission sacrified actual and substantial benefits to competition in the present and future for the sake of an ephemeral possibility based upon contingencies that could not then occur and might never have come to pass.

D. In Applying the "Actual Potential Entrant" Theory, the Eighth Circuit Failed To Give Proper Weight To Factors Regarded as Essential by the Second, Fourth and Fifth Circuits.

1. Theories relating to "potential competition" have meaning only as applied to concentrated markets which are not functioning competitively. *See United States* v. *Marine Bancorporation,* 418 U.S. at 630. High concentration ratios create a presumption that the market is a candidate for a "potential entrant" approach, but the presumption may be overcome by objective market facts which show that the ratios do not accurately depict actual market behavior. *Id.* at 631.

The practical approach taken in *Marine Bancorporation* should have compelled the Commission and the Eighth Circuit to consider whether Brunswick had rebutted the presumption created by the concentration ratios by show-

ing—as indeed it had—actual competitive market performance through exit and entry of competitors, competition for marketing outlets, increases in production, planned expansion of facilities, product improvements, new products, efforts at increasing efficiency and decreasing costs, price competitiveness and upgrading of marketing networks. By tacitly rejecting the approach outlined by the Court in *Marine Bancorporation*, the Eighth Circuit repudiated an essential element of the "potential entrant" theory.

2. The United States Court of Appeals for the Fifth Circuit has held that if there are numerous potential competitors waiting in the wings, "elimination of . . . one potential entrant would not be significant"; it would not substantially lessen competition. *Mercantile Texas Corp.* v. *Board of Governors*, 638 F.2d 1255, 1267 (5th Cir. 1981).

In the instant case the Commission and the Eighth Circuit failed to consider the existence of numerous other firms each with incentive, access to capital, access to dealers, brand name recognition, capabilities and knowledge of general United States marketing conditions equal to that of Yamaha (App. 207-09, 212). If the market was as ripe for new entry as the Commission and the Eighth Circuit found and if Yamaha was an "actual potential entrant," so too were many other foreign manufacturers of outboard motors such as Suzuki, Kawasaki, Renault and Volvo. The non-existence of numerous other potential entrants is a requisite to invocation of the "potential entrant" theory, a requisite which the Commission and the Eighth Circuit disregarded in this case.

3. The approach of the Eighth Circuit in this case was in conflict with that of the Second and Fourth Circuits with respect to the probative value of statements of a

company's top level management as to why it could not and would not successfully enter the relevant market.

The ALJ had concluded that Yamaha was not considering entry into the United States market in the predictable future and had no concrete plan to do so (App. 202). He relied, in part, upon the pre-complaint statement of Hisao Koike, the president of both Yamaha and Sanshin, that without the joint venture, "our possible entry into the United States market on our own would be much delayed". In *FTC* v. *Atlantic Richfield Co.*, 549 F. 2d 289 (4th Cir. 1977), the Fourth Circuit relied on "subjective evidence on the part of Arco's top management that Arco would never seriously consider original entry or entry of toehold acquisition" (*Id.* at 297), even though lower level employees had made different recommendations and even though such statements of top management were "self serving," as they always would be in a Section 7 case. *Atlantic Richfield* was followed in *United States* v. *Siemens Corp.*, 621 F.2d 499, 508 (2d Cir. 1980), where the Second Circuit stated:

> "The opinions of lower level employees without management responsibility, absent some indication that the senior management has seriously considered and endorsed those views, simply do not constitute evidence of a corporate intent or commitment to enter a business *de novo*."

In the instant case, however, the Eighth Circuit took the position that standards by top management could be completely disregarded in favor of equivocal documents written by lower level Yamaha engineers discussing the possible development of outboard motors that might be suitable for eventual entry into the United States. The Eighth Circuit rejected the statements of top management because they might be self-serving (657 F.2d at

979 (App. 14, n. 9), even though those statements were not at all improbable on their face and were corroborated by objective market facts.

When the issue is whether a company would or would not enter a market at a particular time, evidence of top management decision-making would appear to be not only probative, but indispensable. That is not to say that statements of top management should be accepted at face value when inconsistent with contemporaneous documents and objective market facts. But here, the statements of top management, manifesting the view that Yamaha could not profitably have entered the United States, are buttressed by the facts, among others, that Yamaha had twice tried and twice failed, and that the reasons for the failure began to dissipate only as a result of the technology acquired through the joint venture.

4. "The degree of uncertainty in any economic prediction becomes unacceptably high as it is projected further and further into the future." *BOC International Ltd.* v. *Federal Trade Commission*, 557 F.2d 24, 29 (2d Cir. 1977); *Mercantile Texas Corp.* v. *Board of Governors*, 638 F.2d 1255, 1271 (5th Cir. 1981). In *BOC* the Second Circuit held that the "actual potential entrant" theory requires a showing of more than even a reasonable probability of "eventual entry" by the outsider. 557 F.2d at 28. The Second Circuit demanded that there be some "reasonable temporal estimate related to the near future, with 'near' defined in terms of the entry barriers and lead time necessary for entry in the particular industry." *Ibid.* In *Mercantile Texas*, the Fifth Circuit agreed, stating:

> "At some point in the future, the degree of concentration in the market becomes so inherently unpredictable that the entire predictive enterprise should be abandoned out of fairness to the outsider firm." 638 F.2d at 1272.

In the instant case the record would support at most a finding that in 1972 that someday and sometime Yamaha might somehow be able to enter the American outboard motor market. Even Mariner was unable to offer a line marketable in the United States until 1976, and then only because it had access to Mercury's higher horsepower outboard motors. Yamaha would have needed much more time than that.

"In sum, it blinks reality to conclude" (*Marine Bancorporation*, 418 U.S. at 637), as did the Eighth Circuit and the Commission, that Yamaha could or would have done what its top management had reasonably determined was wholly impracticable at the time, or that the same factors which could not prevent a Yamaha failure in 1968 and 1971-72, inexplicably would allow Yamaha an "obvious" and significant pro-competitive effect in late 1972, or shortly thereafter.

5. The courts of appeals are not in accord as to how clear the proof must be that a new and potential competitor would have entered the market in the absence of the challenged merger or joint venture. The Fourth Circuit in *Atlantic Richfield Co.* endorsed with apparent approval Professor Turner's view[9] that in such circumstances "prohibition is appropriate only when the market is a tight ologopoly and where an entry by internal expansion *would appear to have been certain*" (emphasis the Fourth Circuit's). 549 F.2d at 294.

The Second Circuit in *BOC* (557 F.2d at 28) and *Siemens* (621 F.2d at 506) and the Fifth Circuit in *Mercantile Texas Corp.* (638 F.2d at 1268) deeming such a

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[9] See Turner, *Conglomerate Mergers* and Section 7 of the *Clayton Act*, 78 Harv. L. Rev. 1313, 1386 (1965).

standard too stringent, have applied a "reasonable probability" test. The Fifth Circuit in *Mercantile*, recognizing the ambiguity of that standard, added:

> "'Reasonable probability' alone, however, does not adequately describe a finding that will prevent federal agencies and district courts from mistaking possibilities for sufficient probabilities." 638 F.2d at 1268.

Attempting to mitigate the ambiguity of the test, the Fifth Circuit required subsidiary findings that independent entry would be profitable, taking into account costs of entry and various other factors, as compared with other opportunities for investment and expansion. If the profits anticipated are similar to those from likely alternatives, there must be evidence as to why independent entry into this market would be preferred. Even if higher profits were to be expected from the independent entry, rebutting evidence could be presented showing that this expectation would not be fulfilled in the particular instance. 638 F.2d at 1269.

In the instant case, the Eighth Circuit, although describing the issue before it as whether Yamaha would "probably" have entered the United States market, did not inquire into any of the factors that the Fifth Circuit declared to be essential (App. 11). On the contrary, the Eighth Circuit relied solely on inferences drawn by the Commission from Yamaha's size, interest in the market, successful marketing experience elsewhere, brand name recognition from the sale of Yamaha motorcycles, and financial strength. Neither the court nor the Commission attempted to analyze any of these matters in detail or the market conditions involved here. Neither gave any weight to the uncontradicted evidence that Yamaha could not profitably or effectively have entered the United States market then or in the predictable future.

E. The FTC's Unprecedented Order Directing That One Joint Venturer Transfer Its Interest To the Other, and at a Windfall Price, Requires Review by this Court.

The "remedy" fashioned by the Commission in this case was unprecedented. It required full divestiture of an interest in a limited-term joint venture. And it directed one of two joint venturers (Brunswick-Mariner) to sell its interest in the venture to the other joint venturer for less than fair value, even though the Commission found that both venturers had violated the law.

In the case of a typical merger found to violate Section 7, "complete divestiture is peculiarly appropriate," *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 328 (1961). However, the case of a limited-term joint venture presents an entirely different situation. There are appropriate remedies much less drastic than complete divestiture. For example, an order prohibiting Brunswick-Mariner from exercising any control over the operation of Sanshin, while at the same time retaining the 38% ownership interest in that company as an investment, would suffice to eliminate the prospect of any "substantial lessening of competition," yet avoid the abhorrent idea of a forfeiture.

In any event, even if it is assumed that divestiture is an appropriate remedy, why should Brunswick-Mariner be required to divest *to Yamaha*? Why should not Brunswick-Mariner be permitted to sell its Sanshin stock to any third party who is willing to buy it?

And if Brunswick-Mariner is required to divest should not Yamaha also be required to divest?

Even if an order requiring divestiture were in order, why should Brunswick-Mariner be forced to sell for net

asset value only? Why should not Brunswick-Mariner be permitted to sell its Sanshin stock for its fair value?

It is customary in a divestiture order to permit a sale at the best price obtainable to anyone willing to buy. There is no legitimate reason why the Commission did not permit that to occur here. The Commission's "remedy", if implemented, would constitute a severe penalty to Brunswick-Mariner and an outright gift to Yamaha of Brunswick's technology and trade secrets. Such a remedy is unsupportable on any theory.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

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81-1288

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

BRUNSWICK CORPORATION and MARINER CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION and
YAMAHA MOTOR COMPANY, LIMITED,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 80-1760 and 80-1913

No. 80-1760

Yamaha Motor Co., Ltd.,

Petitioner,

v.

Federal Trade Commission,

Respondent.

No. 80-1913

Brunswick Corp. and Mariner Corp.,

Petitioners,

v.

Federal Trade Commission,

Respondent.

Petitions for Review of Orders of the Federal Trade Commission.

Submitted: May 18, 1981
Filed: July 29, 1981

Before LAY, Chief Judge, ARNOLD, Circuit Judge, and BECKER,* Senior District Judge.

ARNOLD, Circuit Judge.

These petitions for review challenge an order of the Federal Trade Commission holding that a joint-venture agreement entered into by petitioners for the manufacture and sale of outboard motors is unlawful under Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. The parties to the agreement were Yamaha Motor Company, Ltd., petitioner in No. 80-1760, and Brunswick Corporation and its subsidiary Mariner Corporation, petitioners in No. 80-1913. The principal question presented is whether the Federal Trade Commission had the support of substantial evidence on the record as a whole when it concluded, in the words of Section 7, that the effect of the joint venture "may be substantially to lessen competition." We think the answer to this question is yes, and we therefore affirm the order of the Commission, with some modifications of the remedy it imposed.

I. THE FACTS

The parties. Brunswick is a diversified manufacturer whose products include recreational items. Brunswick began making outboard motors in 1961, when it acquired what is now called its Mercury Marine Division (Mercury). Brunswick is the second largest seller of outboard motors in the United States. Between 1971 and 1973 its share of the outboard motor market fluctuated between 19.8% and 22.6% by unit volume and between 24.2% and 26% by dol-

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* The Hon. William H. Becker, Senior Judge, United States District Court for the Western District of Missouri, sitting by designation.

lar volume. Brunswick also sells its Mercury outboards in Canada, Australia, Europe, and Japan.

Before entering the joint venture, Brunswick, through Mercury, was considering development of a second line of outboards in an effort to increase its market share. Mariner was to become this second line, which Brunswick hoped would expand the dealer network carrying both the Mercury and Mariner brands.

Yamaha is a Japanese corporation incorporated by Nippon Gakki Company, Ltd. In 1972, it made outboard motors, motorcycles, snowmobiles, and boats. Since 1961, Yamaha has sold snowmobiles, motorcycles, and spare parts to Yamaha International Corporation, a wholly owned subsidiary of Nippon Gakki, which distributes to the United States. In 1972, 40% of Yamaha's total sales were from exports to this country, and 70% of its total production was for export to some country other than Japan. Yamaha manufactures outboard motors through Sanshin Kogyo Company, Ltd., also a Japanese corporation. Since 1969, when Yamaha acquired 60% of Sanshin's stock, Sanshin has produced Yamaha brand outboard motors, and they are sold in most outboard motor markets throughout the world.

The Joint Venture Agreement. On November 21, 1972, Brunswick and Yamaha entered into a joint venture under which Brunswick, through Mariner, acquired 38% of the stock of Sanshin. Yamaha's share in Sanshin also became 38%, with the balance of the stock held by others not involved here. Sanshin was to produce outboard motors and sell its entire production to Yamaha. Some of the motors were to be sold by Yamaha under its own brand name, while the rest, physically identical, were to be resold by Yamaha to Mariner, to be marketed by it under the Mariner brand name.

Under the agreement Sanshin's governing board had eleven directors, six selected by Yamaha and five selected by Brunswick. Certain corporate transactions, such as expansion of product lines or budget approval, required the approval of seven of the directors. In addition, there was a four-person "operating committee," on which Brunswick and Yamaha were equally represented. The agreement was to last an initial term of ten years, with automatic three-year extensions to follow, but either party had the right to terminate it at the end of any term, by giving three years' written notice.

A collateral or ancillary agreement gave Brunswick the exclusive right to sell Sanshin-produced outboards in the United States, Canada, Mexico (with some exceptions), Australia, and New Zealand. Yamaha obtained the exclusive right to the sale of Sanshin outboards in Japan. In the rest of the world's markets, Sanshin-produced Yamaha and Mariner engines could be sold in competition with one another. There were several other collateral agreements, which (1) barred Yamaha from manufacturing directly or indirectly the same or similar engines made by Sanshin or from purchasing any other outboard motors from other suppliers for resale, (2) limited competition between Brunswick and Yamaha in those remaining markets where both were permitted to sell Sanshin-produced motors, and (3) prohibited Brunswick from manufacturing any products competitive with those then produced by Yamaha, except snowmobiles.

The Market. The United States outboard motor industry is often divided into low-horsepower and high-horsepower segments, both of which are dominated by a few firms. The four largest firms in 1973 were Outboard Marine Corporation (OMC), which produces the Johnson and Evinrude brands, Brunswick, Chrysler, and Eska. These

four firms accounted for 94.9% of the United States market in terms of units sold, with the top two firms, OMC and Brunswick, controlling 72.9%. Market-share totals by dollar volume indicate even greater concentration. The top four firms accounted for 98.6%, with the same top two firms accounting for 85%.

The outboard motor industry, though productive of rapid growth in sales and high profits, has not attracted new entrants. On the contrary, it has experienced a decline in the number of firms. Of the eight competitors active in 1965, three had departed by 1969.

II. PROCEEDINGS BELOW

This case was formally instituted on April 15, 1975, when a complaint was filed challenging the legality of the joint-venture agreement under Sections 7 and 5, and alleging that certain of the collateral agreements were unlawful as "unfair methods of competition" under Section 5. After a lengthy hearing before an administrative law judge, the ALJ issued an initial decision recommending that the complaint be dismissed.[1] He found that "Yamaha was a likely potential unilateral entrant into the United States high horsepower outboard market, and in fact was the most likely potential entrant; and Yamaha exerted, prior to the joint venture, a substantial procompetitive effect on the behavior of those in the market from its position on the edge of the market." A-154. The ALJ nonetheless concluded that the net effect of the joint venture was to increase competition, not lessen it: "the main objective fact in this case . . . is that the joint venture added to the relevant market a new procompetitive force—the Mariner line of outboard motors." A-159. The ALJ also found that

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[1] For the ALJ's initial decision, see pp. A-66 through A-168 of the Joint Appendix filed by counsel for all parties in this Court. Pages of the Joint Appendix will be cited as A- ____ in this opinion.

Yamaha, as of 1972, when the joint venture was entered into, "was not considering entering on its own in the near future and had no concrete plan to do so." A-120.

On appeal, the Commission reversed. On November 9, 1979, it held that Yamaha was, in 1972, both an actual and a potential competitor of Brunswick.[2] The FTC did not find the elimination of Yamaha as an independent actual and potential competitor outweighed by any procompetitive effects of the joint venture. In particular, it rejected the ALJ's characterization of Mariner as a new or additional force increasing competition in the sale of outboard motors in the United States. The Commission also held unlawful three collateral agreements associated with the formation of the joint venture: (1) The agreement precluding Yamaha from marketing the joint-venture output in North America, and precluding Brunswick from doing so in Japan, but leaving Brunswick free to continue selling its Mercury brand all over the world; (2) the agreement that Brunswick would not invite Yamaha dealers in the so-called "non-exclusive markets," principally Europe and South America, to join the Mariner network;[3] and (3) the Technical Assistance Agreement for exchange of certain technical information, providing that Mercury would not manufacture any product competitive with those then being

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[2] Neither of the Commission's opinions has, as of this writing, been officially reported. The Commission's opinion on liability is unofficially reported as *Brunswick Corp.*, [1979] CCH Trade Reg. Rep. ¶21,623. It is also found at A-170-200. Commissioner Pitofsky wrote the unanimous opinion, joined in by three other members. One member did not participate.

[3] As part of this agreement, Mercury's President (who was also Mariner's Chairman), told Yamaha that "we recognize that . . . our basic philosophy must be to respect each other's position. . . ." Complaint Counsel's Exhibit (CCX) 77-C (letter of August 10, 1973).

made by Yamaha, with the exception of snowmobiles. The Commission remanded the matter to the ALJ with directions to make additional findings and formulate a recommended remedial order.

The ALJ promptly complied with this direction, and the Commission in due course issued an order in substance adopting his recommendations as to appropriate relief. The FTC's final order, entered on August 14, 1980, directed that the joint-venture agreement be rescinded.[4] It ordered Brunswick and Mariner, within 90 days from the date the order became final, to sell the Sanshin stock back to Yamaha at a price based on "the value of the net tangible assets per share, computed and adjusted to the last day of the six-month term immediately preceding the date of the sale." ¶I, at [1980] CCH Trade Reg. Rep. p. 21,917. The order also prohibited Brunswick and Mariner from making or enforcing any agreement preventing any person from manufacturing, selling, or distributing outboard motors in the United States (¶IV, *id.* at p. 21,918); it forbade Yamaha to make or observe any agreement that would prevent it from manufacturing, selling, or distributing outboard motors in the United States (¶V, *ibid.*); and it prohibited Brunswick, Mariner, and Yamaha, for a period of three years, from making any acquisition in the outboard-motor industry without the prior approval of the Commission (¶VI, *ibid.*).

Brunswick (together with Mariner) and Yamaha have filed separate petitions for review. Brunswick's principal argument is that the findings of violations of Sections 7 and 5 are not supported by substantial evidence. It also, and in the alternative, objects to the remedy of divestiture

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[4] The Commission's opinion on relief is unofficially reported at [1980] CCH Trade Reg. Rep. ¶21,740. It is also found at A-230-41. Commissioner Pitofsky again wrote for the Commission.

of the Sanshin stock and asserts that certain other portions of the FTC's remedial order are not reasonably related to any violation found.[5] Yamaha does not challenge the Commission's basic holding that the joint venture was unlawful. It seems content to terminate the relationship entirely. It does argue that any finding as to it should be based only on Section 5 of the FTC Act, since only Brunswick, not Yamaha, acquired any stock as part of the joint-venture agreement, and acquisition of stock, it is said, is a *sine qua non* of Section 7 liability. Yamaha also asks that the remedial order be modified: (1) by valuing the Sanshin stock it must re-purchase as of a date prior to the FTC's finding of liability on November 9, 1979; (2) by freeing it from certain restrictions on future distribution of outboard motors in the United States; and (3) by striking the three-year prohibition on acquisitions without Commission approval.

III. ANALYSIS

We start by reminding ourselves that our review of the Commission's findings of fact (on which this whole case turns) is limited. Section 11(c) of the Clayton Act, 15 U.S.C. §21(c), provides that "the findings of the commission . . . as to the facts, if supported by substantial evidence, shall be conclusive." And Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c), states: "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."[6] This standard applies not-

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[5] Brunswick also asks us to set aside the Commission's order because it failed to disqualify one of the law firms retained by Yamaha. We reject this request and do not choose to discuss it at any further length.

[6] We assume that the same substantial-evidence standard governs our review of FTC Act and Clayton Act findings, despite the absence of the word "substantial" in Section 5(c) of the FTC Act.

withstanding the fact that the Commission's findings vary in some respects from the recommendations of the ALJ. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). We are mindful that the ALJ's findings and observations must be considered, along with the rest of the record, in determining whether the evidence supporting certain findings is substantial. For "evidence supporting a conclusion may be less substantial when an impartial, experienced [ALJ] who has observed the witness and lived with the case has drawn conclusions different from the [Commission's] than when he has reached the same conclusions." *Id.* at 496. The significance of an ALJ's findings, on the other hand, "depends largely on the importance of credibility in the particular case." *Ibid.* Here, the Commission's differences from the ALJ turn more on what inferences should be drawn from the established facts, than on belief or disbelief of testimony from witnesses whom the ALJ could observe face to face. And through the whole process we are alert to the fact that Congress has entrusted the fact-finding process primarily neither to us nor to the ALJ, but to the Commission itself.

There are two more threshhold questions. Section 7 prohibits any corporation engaged in commerce from acquiring, directly or indirectly, the stock or assets of any other corporation engaged in commerce "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. §18. Thus, we must define the relevant geographic (section of the country) and product (line of commerce) markets prior to resolving whether any specific conduct is violative of the Clayton Act. As for the relevant geographic market, our task is an easy one. The parties have stipulated that the United States is the relevant geographical market. The Commis-

sion found the relevant product market to be all outboard motors, including submarkets for low-horsepower (20 horsepower and below) and high-horsepower motors. Though the ALJ's determination differed somewhat, this finding by the Commission is not challenged on review.

We now turn to the arguments for reversal urged by the appellants. The arguments for Brunswick and Yamaha are several and distinct. Each will be discussed in turn, beginning with those of Brunswick.

Brunswick's Arguments for Reversal.

Brunswick first challenges the Commission's finding that the joint-venture agreement is violative of §7 of the Clayton Act as not supported by substantial evidence. This general attack necessarily involves several points, because the Commission's finding of a §7 violation rests on two alternate grounds. Those grounds are

> (1) [that] as a result of the joint venture, Yamaha may have been eliminated as an actual potential entrant into the United States outboard motor market, [and] (2) the joint-venture agreement may have substantially reduced existing competition between Yamaha, Mercury, and others in the United States market, ...

Brunswick Corp., [1979] CCH Trade Reg. Rep. ¶21,623, at p. 21,781 (citations omitted).

The Commission's first ground involves application of a theory known as the "actual potential entrant doctrine." In essence the doctrine, under the circumstances of this case, would bar under §7 acquisitions by a large firm in an oligopolistic market, if the acquisition eliminated the acquired firm as a potential competitor, and if the acquired firm would otherwise have been expected to enter the relevant market *de novo*. To put the question in terms appli-

cable to the present case, would Yamaha, absent the joint venture, probably have entered the U.S. outboard-motor market independently, and would this new entry probably have increased competition more than the joint venture did? We stress the word "probably" in this formulation of the issue, because the question under Section 7 is not whether competition was actually lessened, but whether it "may be" lessened substantially. The question arises here, of course, not in the perhaps more common context of an outright acquisition of a competitor that might otherwise have entered, but in the form of acquisition of stock in a jointly owned company, an acquisition that necessarily foreclosed (for the duration of the joint venture) the independent entry of Yamaha, the other joint venturer.

Although the Supreme Court has yet to rule specifically on the validity of the actual-potential-entrant doctrine,[7] it has delineated two preconditions that must be present, prior to any resolution of the issue. First, it must be shown that the alleged potential entrant had "available feasible means" for entering the relevant market, and second, "that

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[7] *United States* v. *Marine Bancorporation*, 418 U.S. 602, 639 (1974); see *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973). The doctrine has considerable support among the lower courts and legal commentators. See *Brunswick Corp.*, [1979] Trade Reg. Rep. at pp. 21,781-82 n.25. We refer in this opinion to the "actual potential entrant doctrine" because that phrase seems to be in vogue in antitrust circles. We doubt whether such grandiose nomenclature is appropriate. The so-called "doctrine" is only one of many special cases that may or may not, depending on the evidence, involve a substantial lessening of competition. The question before us is simply whether the Commission acted within the zone of choice marked out by the substantial-evidence standard when it found that there would probably have been more competition without the joint venture than with it.

those means offer[ed] a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." *United States* v. *Marine Bancorporation, supra,* 418 U.S. at 633. On this basis the Commission's decision is amply supported by the evidence.

A finding that the first precondition exists, in essence, establishes whether the firm in question is an "actual potential entrant." It is clear that absent the joint venture, *de novo* entry into the United States market, in both the low and high horsepower submarkets, was Yamaha's only alternative, unless it was prepared to abandon the United States market altogether, which is most unlikely. There is substantial evidence to support the finding that such entry into the United States market is an attractive alternative. The United States market for outboard engines is the largest and most sophisticated one in the world. In addition, at the time of the agreement, Yamaha was selling substantial numbers of outboard motors in every developed market in the world, *except* the United States. Yamaha's management had the requisite experience in the production and marketing of outboard motors in areas of the world other than Japan.

There is also evidence that Yahama had the technology needed to be a viable entrant into the United States market. Yamaha had long been a leader in other parts of the world in production of outboards in the low-horsepower range, and at the time of the agreement was engaged in an ambitious program of development of motors in the high-horsepower range. By 1969 Yamaha had plans to market a 25-horsepower engine in the United States. Engines with a 25-horsepower and 55-horsepower ratings were exhibited by Yamaha at the 1972 and 1973 Tokyo boat shows, and the 55-horsepower model was marketed in

Japan in 1973 and 1974.[8] Thus Yamaha was close to possessing a "complete line" of models with a wide horsepower range suitable for entry into the United States market.

Brunswick argues that possession of a network of marine dealers to sell and service the outboards was essential, that Yamaha lacked such a network, and that Yamaha was therefore in no position to enter the United States market.

Engines in the high-horsepower range are sold predominantly through dealers, while the low-horsepower models are commonly sold by both dealers and mass merchandisers. The lack of a network of dealers is indeed an obstacle to viable participation in the United States market, but it is probably less so for Yahama than for others. First, Yamaha, through its sales of motorcycles in the United States, had considerable name recognition. Next, three was evidence that most marine dealers enter into one-year contracts. Thus, recurring opportunities exist for a manufacturer to obtain new dealers. Last, many dealers carry more than one line of outboards, so Yamaha might have been able to persuade established dealers to carry a second line. Sales to mass merchandisers were also available, under the Yamaha brand name or some other brand name. We think the Commission was reasonable in finding that Yamaha had viable opportunities to market its wares effectively in the United States.

As recounted above, the objective evidence of Yamaha's capacity to enter the United States market is substantial.

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[8] As a matter of fact, OMC was so impressed by Yamaha's new 25-h.p. model that it upgraded its own 25-h.p. motor. The president of OMC testified that "we had no plans to upgrade the 25-horsepower engine until the Yamaha came along." Transcript of Testimony Before the ALJ (Tr.) 364.

There is also considerable evidence of Yamaha's subjective intent to enter the United States. Prior to the 1972 agreement Yamaha made two less-than-successful attempts to penetrate the United States market. The first attempt came in 1968 when it introduced low-horsepower models into the United States market on a limited scale. This effort failed primarily because the motors were too expensive, and Yamaha's one-cylinder, air-cooled engines were ill-suited to United States consumers, who preferred two-cylinder, water-cooled engines. In 1972 Sears Roebuck & Company offered a 1.5-horsepower Yamaha engine but discontinued the arrangement with Yamaha because the motors proved to be too expensive for Sears customers because of their high quality. These attempts at penetration, coupled with Yamaha's ambitious program to develop high-horsepower models, aimed specifically at the American consumer, indicate a high degree of interest in penetrating the United States market. The 55-h.p. motor that Yamaha exhibited at the 1972 Tokyo boat show was actually being marketed in Japan in 1973. A managing director of Yamaha testified that "with the addition of the 55 horsepower, that is about the time we can go into a developed market like the United States or Canada." Tr. 699.[9]

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[9] The ALJ's contrary recommendation on the likelihood of Yamaha's actual entry was based in large part on two items of evidence: a written statement by the president of Sanshin that "[i]f the joint venture were not consummated, . . . our possible entry into the United States market on our own would be much delayed," CCX 79-E; and the testimony of a vice-president of Mercury, Tr. 856-58, that Yamaha could not have become a substantial factor in the U.S. market for several years. If the ALJ were a District Court, we would be unable to say that his finding, based on this evidence, was clearly erroneous. But this case is in a different posture entirely. We are reviewing the substantiality of the evidence to support the Commission's, not the ALJ's, findings. These

(footnote continued)

The record amply supports the Commission's finding that Yamaha had the available feasible means for entering the American outboard-motor market. We next inquire whether "those means offer[ed] a substantial likelihood of ultimately producing deconcentration of [the United States] market or other significant procompetitive effects." *Marine Bancorporation, supra,* 418 U.S. at 633. The Commission found that "[i]ndependent entry by Yamaha would certainly have had a significant procompetitive impact." *Brunswick Corp., supra,* [1979] Trade Reg. Rep. at p. 21,784. Given the factual context of this case, support for this conclusion is easily found. We start by reemphasizing the oligopolistic nature of the outboard-motor market in the United States. The top four firms had 98.6% of the dollar volume, and the top two, OMC and Brunswick, controlled 85.0% of the market by dollar volume. Any new entrant of Yamaha's stature would have had an obvious procompetitive effect leading to some deconcentration.[10]

(footnote continued)

items of evidence are not, in our view, strong enough to call the Commission's findings significantly into question. Both the written statement and the oral testimony referred to came from corporate officials with an incentive to minimize the probability of Yamaha's independent entry. And even if, as regards the live testimony, deference is owed to the ALJ's observation of the witness's demeanor, the same is not true of Sanshin's written statement, which came after the FTC had begun its investigation and in response to a letter of inquiry from the FTC's Bureau of Competition. The Commission was in just as good a position to assess the weight of this written exhibit as the ALJ was.

[10] As the Second Circuit said in *BOC International, Ltd.* v. *Federal Trade Commission,* 557 F.2d 24, 27 (2d Cir. 1977), "[T]ypically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant procompetitive effects, *see Ford Motor Co.* v. *United States,* 405 U.S. 562, 587 (1972) . . . (Burger, C.J., concurring and dissenting)."

Yamaha is a well-established international firm with considerable financial strength. In addition, the Yamaha brand name was familiar to American consumers, and Yamaha had considerable marketing experience in the United States.

This evidence notwithstanding, Brunswick argues that the anticompetitive effects of the joint venture were outweighed by the procompetitive effects. The anticompetitive impact of the agreement is said to be mitigated by the temporary nature of the agreement, the introduction of Mariner, a new seller, into the market, and the enhancement of Yamaha's ability to enter *de novo* when the joint venture terminates. The Commission considered these points but concluded that they did not outweigh the anticompetitive effects. That conclusion is supported by the evidence.

The agreement between Yamaha and Brunswick is more properly characterized as "terminable" than as "temporary." By its terms the agreement had a life of ten years with automatic extensions of three years, subject to termination by prior notice of either party.[11]

Brunswick's argument that the agreement offered an immediate procompetitive impact on the market was also considered by the Commission, but found to be lacking. Brunswick's Mercury line was, of course, already in the market. Sanshin's productive capacity was already in existence. The addition of Mariner to the United States

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[11] Yamaha gave notice of termination one day prior to the date the Commission's decision was rendered. This circumstance is not controlling. The agreement was of indefinite length when the FTC's enforcement proceeding began. Whether it would have been terminated if no complaint had been filed by the FTC is almost completely conjectural.

market is not of great significance when one considers that it is controlled by Brunswick and cannot be reasonably expected to compete actively with the parent firm. As the Supreme Court said in *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 169 (1964) (emphasis ours):

> [i]f the parent companies are in competition, or *might compete* absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce.

Further, the chairman of Mariner was the same individual who served as president of Mercury; Brunswick was in a position to veto many of the major corporate decisions at Sanshin because of the make-up of the board of directors; and several elements of the agreement were aimed at minimizing competition between Mercury and Mariner, such as the understanding that Mariner engines would not be sold to existing Mercury dealers. In short, the joint venture did not bring into the market an additional independent decisionmaker, as Brunswick would have us believe, but only added to the productive capacity of the second largest firm in a four-firm-dominated industry.

Brunswick's last argument relative to the agreement's procompetitive effects is that through Yamaha's participation in the agreement, Yamaha's ability to enter the United States *de novo* upon termination of the agreement was greatly enhanced. This argument assumes that the joint venture was temporary and that without it Yamaha lacked the ability to enter the United States market. Both of these propositions are at odds with the Commission's findings. We have already discussed the "temporary" nature of the agreement. As for Yamaha's present ability to enter the market, Brunswick maintains that without certain technological exchanges provided for in the agreement, Yamaha could not possibly have entered the market. The Commission found that by 1973 Yamaha had in pro-

duction or development the "complete line" of motors needed for viable entry into the United States market. This finding, though not the only permissible inference from the record, has adequate support in the evidence.

Accordingly, the record supports the Commission's finding that the " 'essential preconditions' set out in *Marine Bancorporation* are fully met, and that Yahama was an actual potential entrant into the [United States]."[12] *Brunswick Corp., supra,* [1979] Trade Reg. Rep. at p. 21,785 (footnote omitted).

The Commission's finding that Brunswick's acquisition of 38% of the stock of Sanshin violated Section 7 of the Clayton Act is supported by substantial evidence on the record as a whole and will be affirmed.[13] It follows that

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[12] Some courts require a third showing that involves some indication as to when the entry can be expected to occur. In *BOC International, Ltd. v. Federal Trade Commission, supra,* the Commission found a "reasonable probability" of "eventual entry." 557 F.2d at 28-29. The *BOC* court thought this standard lacked a temporal estimate and was therefore unacceptably speculative.

Our situation is very different from that presented by *BOC*. BOC, though it was the world's third largest producer of industrial gases, had never produced or sold industrial gases in the United States. *Id.* at 25. In the case at bar we are presented with a firm that has twice attempted entry into the relevant market, and we have specific findings to the effect that at the time of the joint venture Yamaha was capable of entering the relevant market. We consider this showing considerably more definite than was the case in *BOC*.

[13] Brunswick also argues that Section 7 cannot have been violated because Sanshin the company whose stock it acquired, was not "in commerce," as required by the statute during the time period relevant to this case. Sanshin, it says, did nothing in the United States. It simply manufactured motors in Japan. We disagree. A large portion of Sanshin's output was specifically intended for sale in the United States under the Mariner label.

the joint-venture agreement also violated Section 5 of the FTC Act. *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 609 (1953).[14] It is unnecessary for us to discuss the FTC's alternative ground of decision, that the joint venture also eliminated Yamaha as an actual competitor.

Our examination does not end here, however, because the Commission also found certain agreements collateral to the joint venture agreement to be prohibited by §5. The Commission found three of the collateral agreements to be unreasonable and violative of §5. The first was a territorial limitation on the sale of outboards under which Yamaha had the exclusive right to sell Sanshin products in Japan under the Yamaha label. Mercury's rights to sell in the Japanese market were unaffected, but Mariner could do no business there. Mariner, however, was granted exclusive rights to market Sanshin products in North America. Up to this point the agreement is arguably a valid one, assuming the validity of the joint venture itself, but there is more. The agreement also provided that Yamaha was barred from producing outboards similar to the Sanshin product or from purchasing for resale, except in Japan, outboards produced by any third party. Thus the agreement permits Brunswick to market outboards, using the Mercury brand, in competition with Mariner throughout the world, but Yamaha is unable to market

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[14] Section 5 is a general prohibition against unfair methods of competition. It includes but is not limited to the specific acts and practices condemned by the Sherman and Clayton Acts. The purpose of the particular method or practice need only run "counter to the public policy declared in the Sherman and Clayton Acts, [before] the Federal Trade Commission has the power to suppress it as an unfair method of competition." *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457, 463 (1941) (footnote omitted).

non-joint-venture products anywhere but in Japan. Yamaha may not engage in any competitive efforts in the United States market with non-joint-venture outboard motors. This limitation cannot be termed "reasonably necessary" to the purpose of the joint venture. It serves only to insulate Brunswick from Yamaha in the United States market. Brunswick is free to compete with non-joint-venture output through Mercury, both in the United States and in the rest of the world's markets. There is no sufficient reason why Yamaha should not be free to do the same.

Second, there was an agreement between Brunswick and Yamaha to limit competition between themselves in certain "non-exclusive markets," for the most part in Europe and South America. In essence the parties agreed not to seek out the other's dealers in these markets, but rather to concentrate their competitive efforts against other manufacturers. This is merely an agreement between horizontal competitors to direct their efforts elsewhere. It has no substantial relation to any legitimate purpose of the joint venture.

Third, Brunswick and Yamaha entered into a Technical Assistance Agreement which, *inter alia*, granted reciprocal licenses to use each other's technical information. This agreement also barred Brunswick from manufacturing any product competitive with those manufactured by Yamaha, except snowmobiles. This foreclosure of competition between the two firms was viewed by the Commission as an unreasonable extension of the joint-venture agreement. We agree. The agreement is not limited to the subject of the joint venture, the sale of outboard motors, but serves to eliminate possible competition with respect to other products. The Comission's conclusion that these three collateral agreements violated Section 5 was a proper one on this record.

The last of Brunswick's arguments is that the cease-and-desist order, containing a requirement of complete divestiture to Yamaha of Brunswick's interest in Sanshin and other injunctive provisions, does not bear a reasonable relationship to the violation. We are told that Yamaha, by its notice of termination, has removed any practical need for the proposed relief. Brunswick suggests that it should be allowed to continue owning 38% of the stock of Sanshin, and that an order be entered simply enjoining Yamaha and Brunswick from taking any action which would continue the joint venture and its collateral restrictions beyond the ten-year term.

The Commission ordered complete divestiture in an effort to restore Yamaha to its previous position as a potential entrant into the United States market. The correctness of the Commission's action cannot be seriously questioned, for "complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate §7." *United States* v. *E.I. de Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961) (footnote omitted). Mere termination of the joint venture would leave Brunswick as owner of 38% of Sanshin's stock. Even without continued representation on Sanshin's governing board, Brunswick could exert considerable influence over the corporate policy of Sanshin, thus hindering the restoration of Yamaha as a potential competitor.[15] That portion of the remedial order compel-

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[15] As owner of 38% of Sanshin's voting stock Brunswick would have what amounts to a veto over many significant corporate actions. The Japanese Commercial Code and Sanshin's Articles of Incorporation require a two-thirds majority for certain transactions. Brunswick would be in a position to block transactions such as acquisitions, mergers, issuance of new shares, and changes in authorized capital.

ling divestiture is well within the Commission's "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices . . . ." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611 (1946).

The Commission's order contains other injunctive provisions that (1) prohibit Brunswick from entering into any agreement preventing Yamaha or any other firm from engaging in the manufacture, sale, or distribution of outboard motors in the United States, and (2) require that for a period of three years Brunswick seek prior Commission approval of any acquisition of any firm engaged in the production, distribution, or sale of outboard motors. These provisions, as well as others relating to Brunswick, are reasonably related to the violations found by the Commission. See *Jacob Seigel Co., supra*, 327 U.S. at 613.

Yamaha's Arguments for Reversal. Yamaha does not contest the Commission's finding that the joint venture and related agreements violated Section 5 of the FTC Act. It does ask that the basis of the finding of liability on its part be limited to Section 5. Yamaha did not *acquire* any stock; it simply sold Sanshin stock to Brunswick's subsidiary, Mariner. Therefore, we are told, there is no basis for a holding that Section 7, which forbids conduct only by *acquiring* parties, has been violated by Yamaha. The question is not an academic one to Yamaha. Under Section 5(a) of the Clayton Act, 15 U.S.C. §16(a), a final decision by the FTC in a proceeding brought "under the antitrust laws" that a violation of one of those laws has occurred, is *prima facie* evidence against the defendant in a later private action. And under Section 5(i), 15 U.S.C. §16(i), the bringing by the United States (including the FTC) of a proceeding to prevent "violations of any of the anttirust laws" suspends the running of the statute of limitations on private antitrust actions as long as that pro-

ceeding is pending, and for one year thereafter. Section 7 is one of the "antitrust laws" within the meaning of Sections 5(a) and 5(i) of the Clayton Act, while Section 5 of the FTC Act is not. See Section 1(a) of the Clayton Act, 15 U.S.C. §12(a); *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 375-76 (1958).

We find it unnecessary to decide on this petition whether a seller, as opposed to a buyer, of stock can ever be in violation of Section 7. For the Commission, both in its brief, see Brief for Respondent 16 n.8, and at the oral argument, has disclaimed any interest in the question. It is content to let the finding as to Yamaha rest solely on Section 5. We will therefore modify the Commission's order accordingly.

Yamaha also questions certain aspects of the relief ordered. Under the order, Brunswick must re-sell its Sanshin stock to Yamaha. The sale price is set at "the value of the net tangible assets per share, computed and adjusted to the last day of the six-month term immediately preceding the date of the sale." *Brunswick Corp.*, [1980] CCH Trade Reg. Rep. ¶21,740, at p. 21,917. The date of sale is set at "within 90 days of the date [the Commission's] Order becomes final[.]" *Ibid.*

Yamaha proposes a fixed valuation date of October 31, 1979, which is the close of the accounting period immediately preceding the November 9, 1979, decision of the Commission finding the joint venture illegal. Because the Sanshin stock has appreciated in value in the years since the joint venture was entered into, and because Yamaha expects it to continue to appreciate, Yamaha argues that the Commission's failure to fix a date certain for valuation works an undue hardship on it. We are told that allowing Brunswick's holdings to increase in value discourages Ya-

maha from further investment in Sanshin and encourages delay during the appeal period. Yamaha also argues that the added financial burden lessens its viability as a competitor.

The goal of the relief ordered here was the restoration "so far as practicable and equitable, [of] the state of competition in the relevant market as it would have been but for the acquisition." *Brunswick, supra,* at p. 21,913, citing *Fruehauf Trailer Co.,* 68 F.T.C. 1167, 1168 (1965), *modified,* 69 F.T.C. 180 (1966). In pursuit of that goal the Commission found that a simple rescission of the agreement, requiring resale of the Sanshin stock at the original price, would impose a substantial economic hardship on Brunswick. In an attempt to be fair to both parties, the Commission selected the valuation formula (net tangible assets per share) contained in the joint-venture agreement, which we assume was the product of arms' length bargaining. As for the failure to fix the date of valuation, as suggested by Yamaha, the Commission said:

> Since considerable time may pass before our order is effectuated, we believe that both parties should share in any appreciation in the value of Sanshin's assets.

Brunswick, supra, at p. 21,916 n.26.

Yamaha argues, in sum, that Brunswick has been treated too leniently. We cannot agree. One must consider that both Brunswick *and* Yamaha have been found to be in violation of the law. With this in mind the Commission attempted to minimize the economic hardship to each party, but only after determining that complete rescission of the joint venture agreement was the sole effective remedy. See *United States* v. *du Pont & Co., supra,* 366 U.S. at 326-27. This aspect of the Commission's order is clearly within the bounds of reasonableness.

Yamaha questions next paragraph V of the relief order, which prohibits Yamaha from entering into any agreement which prevents it "from manufacturing, selling, or distributing outboard motors in the United States."[16] Yamaha specifically argues that this paragraph would bar certain vertical restrictions, such as distribution and retail marketing agreements, that may have procompetitive effects. For example, a likely avenue of Yamaha's initial entry into the United States market would involve a series of distributional and retail marketing arrangements with suitable business entities in the United States. Such arrangements often provide for exclusive territories that restrict competition between the parties in assigned areas. Yet, Paragraph V of the order, if read literally, would, in advance and without exception, prevent Yamaha from agreeing that it would not itself make direct sales in one of its dealers' or distributors' primary areas of responsibility.

The Supreme Court in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), recognized that such vertical restrictions often restrict intrabrand competition while promoting interbrand competition, thus enabling a manufacturer to compete more effectively with other manufacturers. The Court gave the following example of the positive aspects of vertical restrictions:

> For example *new manufacturers and manufacturers entering new markets* can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is

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[16] Paragraph V of the relief order reads in full:

> It Is Further Ordered that from the date this Order becomes final, Yamaha shall not enter into, continue to be a party to, or observe any agreement which in whole or in part prevents Yamaha from manufacturing, selling, or distributing outboard motors in the United States, its territories or possessions.

Brunswick, supra, at p. 21,918.

> often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.

Id. at 55 (emphasis ours). We do not see why Yamaha, a firm seeking to enter the United States market, should not have the option of employing some if not all of the above strategies. None of Yamaha's conduct that has been held illegal related to vertical restraints on persons buying goods from it for resale. The competition suppressed by the joint-venture agreement was primarily horizontal (either actual or potential). The Commission argues that the arrangement also imposed a vertical restraint on Yamaha, in the sense that one of the collateral agreements prohibited Yamaha from buying certain products for resale from any seller other than Sanshin, except for resale in Japan. This provision is wholly unrelated to the kind of downstream vertical restraint on dealers and distributors that Yamaha may wish to use as it attempts to make a new and independent entry into the U.S. market. We conclude that the order, to the extent that it makes such restraints unlawful *per se,* so to speak, goes beyond any reasonable relationship to the violations found. This is not to say that Yamaha will have *carte blanche* to impose whatever downstream vertical restraints it wishes on itself or its dealers and distributors, but only that nothing

in the FTC's remedial order should make such restraints illegal in and of themselves. It will still be open to any aggrieved party to challenge Yamaha's future conduct. The challenge, however, must come in a new proceeding and be assessed under the rule of reason, as explicated in *GTE Sylvania*.

Last, Yamaha challenges paragraph VI of the relief order, which prohibits Yamaha, for a period of three years, without the approval of the FTC, from acquiring any interest in firms "engaged in the production, distribution or sale of outboard motors in or for the United States." *Brunswick, supra,* at p. 21,918. This acquisition ban, it is argued, although equally applicable to Brunswick, is unreasonable as to Yamaha because it was not the acquiring party under the illegal joint-venture agreement. The Commission justifies this provision of the order, first, by noting that Yamaha, through the joint venture, has once chosen to enter the United States market in an anticompetitive manner. Requiring Yamaha to come before the Commission prior to entering the market by acquisition will simply insure that any future acquisition is not anticompetitive. This supervisory provision puts a tolerable burden on Yamaha's future conduct and is clearly within the bounds of reasonableness. Paragraph VI of the relief order is affirmed.

IV. CONCLUSION

The order of the Federal Trade Commission is modified by adding at the foot thereof the following new paragraphs:

IX.

Nothing in this Order or in the opinions of the Commission in this case shall be construed as a finding or conclusion that Yamaha has violated Section 7 of the Clayton Act. All findings and relief against Yamaha are based solely on Section 5 of the Federal Trade Commission Act.

X.

Nothing in this Order, including in particular Paragraph V hereof, shall prevent Yamaha from imposing upon itself, its dealers, or its distributors, ancillary vertical restraints in connection with the sale by it for resale in the United States of outboard motors.

As so modified, the order of the Commission is affirmed. One-half of respondent's costs shall be taxed against Brunswick and Mariner. No costs are to be taxed against either Yamaha or respondent.

It is so ordered.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Michael Pertschuk, Chairman
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of	)	
BRUNSWICK CORPORATION, a corporation;	)	
	)	DOCKET NO. 9028
YAMAHA MOTOR CO., LTD., a corporation; and	)	
MARINER CORP., a corporation	)	

OPINION OF THE COMMISSION

By Pitofsky, Commissioner:

The sole question here is the formulation of an appropriate order of relief. On November 9, 1979, we determined that a joint venture between Brunswick Corporation ("Brunswick") and Yamaha Motor Company Company, Limited ("Yamaha") violated Section 7 of the Clayton Act[1] and Section 5 of the Federal Trade Com-

[1] 15 U.S.C. §18.

mission Act.[2] Since the Administrative Law Judge ("ALJ") had originally ordered the dismissal of the complaint, his initial decision lacked findings and recommendations on the issue of appropriate relief. We therefore remanded the proceeding to enable him to address those questions. Additional hearings were held on February 19 and 20, 1980, and on March 14, 1980, the ALJ issued his "Findings and Proposed Order." After considering briefs filed by Complaint Counsel, Brunswick and Yamaha we have determined to adopt the ALJ's findings and issue the proposed order, with the minor modification discussed below.[3]

I

We concluded, in our previous opinion, that the joint venture violated the antitrust laws on three theories: (1) it eliminated the potential competition likely to result from Yamaha's probable independent entry into the United States outboard motor market; (2) it eliminated the existing competition Yamaha provided in that market; and (3) it included collateral agreements unreasonably limiting competition between Yamaha and Brunswick. In remanding the proceeding, we instructed the ALJ to determine the most effective means of terminating the joint venture, nullifying the restrictive agreements, and restoring Yamaha as an actual and potential competitor in the U.S. outboard motor market.

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[2] 15 U.S.C. §45.

[3] The following abbreviations are used herein:
IDF — Initial Decision Finding of Fact No.
RDF — Remand Decision Finding of Fact No.
CX — Complaint Counsel's Exhibit No.
CCRAB — Complaint Counsel's Remand Appeal Brief Page No.
BRRB — Brunswick's Remand Reply Brief Page No.

In brief summary, the ALJ's proposed order recommended: (1) the rescission of the joint venture agreement and all collateral agreements; [4] (2) the sale to Yamaha of all Brunswick's stock in Sanshin, the jointly owned manufacturing facility of Yamaha and Brunswick;[5] and (3) a three year prohibition upon Brunswick's or Yamaha's acquisition of any competitor in the outboard motor market without the prior approval of the Commission.[6]

II

Our goal, in fashioning relief for a violation of Section 7, is "to restore, so far as practicable and equitable, the state of competition in the relevant market as it would have been but for the acquisition."[7] As we observed in remanding this question to the ALJ, "we cannot turn back the clock," but "we can seek to restore the market structure to that which existed at the time the venture was entered upon."[8] This joint venture violated the antitrust laws because it eliminated the actual and potential competition that Yamaha represented in the U.S. outboard motor market. A satisfactory remedy must restore Yamaha, to the extent possible, as an actual and potential competitor with approximately that competitive vigor, independence and strength that it possessed in 1972.

We agree with the ALJ's conclusion that this objective can be achieved only by a complete undoing of the joint

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[4] Paragraph II.

[5] Paragraph I.

[6] Paragraph VI.

[7] *Fruehauf Trailer Co.*, 68 F.T.C. 1167, 1168 (1965), *modified*, 69 F.T.C. 180 (1966).

[8] *Brunswick Corp.* [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders.) ¶21,623 at 21,788.

venture. The joint venture agreement and all collateral agreements must be rescinded, and the Sanshin stock held by Brunswick must be resold to Yamaha.

Divestiture of the acquired firm is the familiar remedy for a merger found to lessen actual or potential competition in violation of Section 7.[9] As the Supreme Court observed in *United States* v. *du Pont & Co.*, 366 U.S. 316 (1961), "divestiture is peculiarly appropriate in cases of stock acquisitions which violate Section 7 . . . . The very words of §7 suggest that an undoing of the acquisition is a natural remedy.'"[10] By making the acquired firm an actual or potential competitor again, a divestiture order helps restore the market structure existing before the challenged acquisition. The lessening of competition resulting from this joint venture, as we noted in our previous opinion, is "roughly equivalent" to that which would have resulted from Brunswick's acquisition of an actual or potential competitor.[11] Just as an order of divestiture would have been an appropriate remedy for such an acquisition, we conclude that an undoing of the transaction is appropriate here as well.

We cannot accept Brunswick's suggestion that the order of relief void the various joint venture agreements, but allow Brunswick to retain and vote its shares of Sanshin common stock. Although Brunswick would be guaranteed no representation on the board of directors under this

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[9] *See, e.g., United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *du Pont & Co.*, 366 U.S. 316 (1961).

[10] *United States* v. *du Pont & Co.*, 366 U.S. 316, 328-29 (1961).

[11] *Brunswick Corp.* [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) ¶21,623 at 21,782.

proposed plan,[12] Yamaha's independence and vitality as a competitor might still be impaired. Brunswick's ownership of 38% of Sanshin's voting stock could enable Brunswick to hamper Sanshin's competitive efforts, making Sanshin a less effective competitor than it had been before the joint venture.

Yamaha owned a majority of Sanshin stock prior to the creation of the joint venture, enough to control most questions raised in votes at shareholders meetings.[13] Since Yamaha now owns only 38%, Brunswick could conceivably enlist sufficient support among the remaining 24% held by individual Japanese shareholders to create a majority on some issues or at least to extract significant compromise concessions from Yamaha. Moreover, under the Japanese Commercial Code and Sanshin's articles of incorporation, a two thirds vote is necessary to approve several significant types of corporate actions—a merger or acquisition, for example, a change in authorized capital, or the issuance of new shares of stock.[14] With respect to these questions, Brunswick's 38% of the outstanding stock would amount to an absolute veto.

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[12] The present division of seats on the board of directors—five to Brunswick and six to Yamaha—is required by the joint venture agreement. *See* CX 1. If that agreement were voided, the directors would be elected by shareholders under Sanshin's articles of incorporation. *See* CX 1-Y. Since those articles do not provide for cumulative voting, Brunswick's 38% of the outstanding Sanshin stock is insufficient, alone, to elect any directors.

[13] Sanshin's articles of incorporation provide that: "Unless otherwise provided by law or by these Articles of Incorporation, all resolutions of meetings of shareholders shall be adopted by a majority of the voting rights present at the meeting." CX 1-X.

[14] *See* RDF 42-49.

Finally, aside from the possible influence or control resulting from Brunswick's ownership of Sanshin stock, that stock ownership would also provide Brunswick access to competitively sensitive information otherwise unavailable to competitors.[15] Brunswick's access to such information—profitability data, inventory schedules or new construction reports, for example—might significantly impair Sanshin's effectiveness as a competitor.

This possible lessening of competition resulting from Brunswick's ownership of 38% of Sanshin's common stock is, no doubt, more attentuated than that accompanying the original joint venture itself. Nonetheless, ample authority holds that Section 7 may be violated when an acquisition of less than a majority of a firm's stock creates the possibility that the acquiring firm either may gain access to confidential competitive information, or may be able to steer the acquired firm towards less competitive strategies.[16] Considering the record evidence that Brunswick has eagerly seized opportunities to minimize the competition provided by Sanshin—evidence that can be found in both the creation of this joint venture and in Brunswick's actions during its existence[17]—we conclude that the possible lessening of

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[15] *See* RDF 53.

[16] *See, e.g., United States* v. *du Pont & Co.*, 366 U.S. 316 (1961); *F&M Schaefer Corp.* v. *C. Schmidt & Sons, Inc.*, 597 F.2d 814 (2d Cir. 1979); *Gulf & Western Indust., Inc.* v. *Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687 (2d Cir. 1973); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

[17] The ALJ observed that Brunswick had effectively used its holdings of Sanshin stock and its position on Sanshin's board of directors to hinder any direct competition provided by Sanshin, and hence, Yamaha. *See, e.g.*, RDF 22, 23.

competition likely to result from allowing Brunswick to keep its Sanshin stock is far from insubstantial.

These same considerations dictate that an order requiring the divestiture of Brunswick's Sanshin stock to any buyer would also be an insufficient remedy; the stock must be sold to Yamaha. Divestiture of Brunswick's Sanshin stock to any other buyer would not restore Yamaha to its pre-joint venture competitive position. Yamaha would be left with only a minority holding of Sanshin stock, and not the controlling position it held prior to the joint venture. Without majority control, Yamaha might be unable to enter or compete effectively in the U.S. outboard motor market. Indeed, if Brunswick's Sanshin stock were divested to another competitor in that market, or ultimately come to rest in such a competitor's hands, competition might be lessened in much the same manner as if Brunswick retained the stock—that competitor might be able to influence Sanshin's decision-making, for example, or gain access to competitively sensitive information. We conclude, therefore, that fashioning a satisfactory remedy in this case—a remedy effectively restoring Yamaha as an actual and potential competitor—requires not only the voiding of the joint venture agreements, but the return of Brunswick's Sanshin stock to Yamaha as well.[18]

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[18] No previous decision has ever addressed the problem of determining an appropriate remedy for a joint venture found to violate Section 7. Although consent decrees hold little precedential value, *see United States* v. *du Pont & Co.*, 366 U.S. 316, 330 n. 12 (1961), we note that consent decrees in such cases have ordered relief similar to that suggested here by the ALJ—the voiding of any joint venture agreement and the rescission of any stock acquisition. *See, e.g., Continental Oil Co.*, 72 F.T.C. 850 (1967) (consent order); *Phillips Petroleum Co.*, 70 F.T.C. 456 (1966) (consent order); *United States* v. *Monsanto Co.*, 1967 Trade Cas. ¶72,001 (W.D. Pa. 1967) (consent decree). Courts have concluded that their equitable power encompasses an order directing

(footnote continued)

The provision governing the sale of Brunswick's stock in the ALJ's proposed order of relief differed from a simple order of rescission in one important respect. It ordered that Brunswick sell its Sanshin stock to Yamaha at a price different from that which Brunswick originally paid. Under the joint venture agreement executed in 1972, Brunswick purchased the newly issued Sanshin stock at a price equal to the "value of the net tangible assets per share" of Sanshin's then outstanding stock.[19] That value was calculated by a procedure outlined in the joint venture agreement.[20] Requiring Brunswick to receive the same dollar figure for its sale of the stock under this order might inflict substantial economic hardship; the value of the shares may have appreciated considerably during the intervening years.

The possibility of such hardship, of course, would not be sufficient reason to chose a less effective form of relief. As the Supreme Court noted in *United States* v. *du Pont & Co.*, 366 U.S. 316 (1961), once a conclusion has been reached "that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however

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(footnote continued)

the rescission of a stock acquisition violating Section 7. *See U.S.* v. *Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222 (9th Cir.), *cert. denied*, 439 U.S. 959 (1978); *United States* v. *Reed Roller Bit Company*, 274 F. Supp. 573 (W.D. Okla. 1967). *See also U.S.* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd*, 418 U.S. 906 (1974). We believe that our remedial powers encompass no less. *See Ekco Products Co.*, 65 F.T.C. 1163 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

[19] CX 1-C.

[20] CX 1-C.

severe, may result."[21] But the issue here is not a choice between an effective form of relief and a less effective one, but rather a question of how to implement the form of relief we have already determined to be most effective. We have decided that Brunswick's Sanshin stock must be sold to Yamaha; the question that remains is the appropriate price. In these circumstances, it is important to consider any hardship attendant upon our decree.[22]

No easy answer exists to this problem. The ALJ apparently concluded that any hardship could be minimized by defining the price as "the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale."[23] We affirm that conclusion. The valuation formula chosen by the ALJ was the same one used by the parties to determine the price Brunswick initially paid for the Sanshin stock.[24] The arms length bargaining that oc-

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[21] *United States* v. *du Pont & Co.*, 366 U.S. 316, 327 (1961). One court of appeals, in affirming a district court's issuance of a preliminary injunction to preserve the ultimate availability of recission as a remedy for an acquisition, observed that the possible unfairness to the acquiring company would not be reason to deny the remedy of rescission: "If nothing else, the buyers in this transaction . . . might be required to give back the illegally acquired assets . . . without accepting full repayment." *U.S.* v. *Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 231 (9th Cir.), *cert. denied*, 439 U.S. 959 (1978).

[22] *See Ekco Products Co.*, 65 F.T.C. 1163, 1221 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965) ("If the Commission enjoys, as we think it does, essentially equitable powers under Section 11 of the Clayton Act, it must, as a corollary, assume equitable responsibilities.")

[23] Paragraph I.

[24] CX 1-C.

curred suggests some fairness in that formula.[25] Yet by requiring that the assets be valued near the time of the sale to Yamaha, rather than at the time of Brunswick's initial purchase, the order is likely to reduce any hardships resulting from changes in either Sanshin's assets or their value.[26]

III

In addition to the provisions voiding the joint venture agreements and ordering the divestiture of Brunswick's Sanshin shares, the ALJ's proposed order of relief contained a three year requirement that both Brunswick and Yamaha seek Commission approval before acquiring any firm engaged in the production, distribution or sale of outboard motors.[27] We consider that provision both an appropriate and necessary element of the relief in this case. The authority to include such a requirement in an order of relief cannot be questioned.[28] The sole issue—as it is with any element of a Commission remedial order—is whether this requirement of Commission approval of future acquisitions has some "reasonable relation" to the viola-

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[25] We cannot accept Brunswick's suggestion that the parties be allowed to negotiate a price for the sale. It is difficult to imagine fair bargaining once an order has required that the stock be sold.

[26] We reject Yamaha's suggestion that Sanshin's assets be valued as of October 31, 1979, the close of the accounting period immediately preceding the publication of our opinion finding that the joint venture violated Section 7. Since considerable time may pass before our order is effectuated, we believe that both parties should share in any appreciation in the value of Sanshin's assets.

[27] Paragraph VI.

[28] *See, e.g., Ekco Products Co.*, 65 F.T.C. 1163, 1215 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965); *Abex Corp.* v. *FTC*, 420 F.2d 928, 933 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970).

tions of Brunswick and Yamaha.[29] We conclude that it does.

Brunswick's acquisition of Sanshin stock presents the more typical instance of illegal conduct where this kind of relief is appropriate.[30] Commission review is necessary to insure that Brunswick does not again act to substantially lessen competition in the U.S. outboard motor market by acquiring an actual or potential competitor. Considering the thoroughness with which this joint venture was constructed to minimize the competition provided by Yamaha in the U.S. market, it is reasonable to predict that such a path could be followed again.

Although Yamaha's actions present a more unusual case —Yamaha's violations consisted of participation in this joint venture through sale of stock and of agreement to various covenants not to compete—they nonetheless justify similar relief. A requirement of Commission approval of future acquisitions is especially valuable in the drafting of remedial orders seeking to insure that the possible procompetitive benefits of entry by a potential competitor are not lost.[31] In this case, a primary goal of the order of relief is to preserve the possible procompetitive benefits of Yamaha's potential entry into the U.S. outboard motor market. By participating in the joint venture with Bruns-

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[29] *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-5 (1965); *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegal Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946).

[30] *See, e.g., RSR Corp*, 88 F.T.C. 800 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1313 (1980); *Avnet, Inc.*, 82 F.T.C. 391 (1973), *aff'd*, 511 F.2d 70 (7th Cir.) *cert. denied*, 423 U.S. 833 (1975).

[31] *See, e.g., Ekco Products Co.*, 65 F.T.C. 1163, 1228 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

wick, Yamaha chose to enter that market in a manner that substantially lessened competition. Requiring Yamaha to come before the Commission before entering the market by acquisition or joint venture is necessary to insure that future entry is not also anticompetitive.[32]

Though a requirement of Commission approval is appropriate here, we consider too broad the provision drafted by the ALJ. Yamaha, for example, has objected that the ALJ's order might hamper possible future acquisitions or joint ventures in Japan, or other foreign markets—legitimate competitive acts having no impact upon the U.S. outboard motor market. To allay such concern, we have narrowed the scope of the provision so that it applies only to acquisitions of the stock or assets of firms engaged in the production, distribution or sale of outboard motors "in or for the United States."

The ALJ's proposed order also contained provisions prohibiting both Brunswick and Yamaha from again entering mutual covenants not to compete—either with one another or with any other competitor in the U.S. outboard motor market.[33] We conclude that these provisions are also appropriate and necessary components of the order of relief. They prohibit the repetition of conduct we have found

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[32] Drafting an effective order of relief often requires consideration of possible conduct not involved in the original violation: "When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all untravelled roads to that end be left open and that only the worn one be closed." *International Salt Co.* v. *U.S.*, 332 U.S. 392, 400 (1947). *See, e.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (discussing necessity of "fencing in" in advertising violations); *International Salt Co.* v. *U.S.*, 332 U.S. 392 (1947) (similar issues in tying violation).

[33] Paragraphs IV and V.

illegal—an example of the clearest reasonable relation of remedy to violation.[34] And, as we have already observed, in light of the record evidence it is not unreasonable to conclude that a danger of future anticompetitive conduct exists.[35]

IV

In our previous opinion remanding this proceeding, we instructed the ALJ to study the effect of a termination of this joint venture upon the ability of Mariner dealers to obtain satisfactory supplies of outboard motors. We cautioned that the achievement of an appropriate remedy in this case "should not be accomplished at the expense of the Mariner dealers if that is avoidable."[36]

On remand, Complaint Counsel argued that Mariner dealers would be satisfactorily protected only if the order of relief required Yamaha to continue to supply Mariner with "commercially reasonable quantities" of outboard motors until April 30, 1983, and of spare parts for those motors until April 30, 1990.[37] To insure that Yamaha would have the technology necessary to satisfy those supply obligations, Complaint Counsel also proposed provisions in the order of relief: (1) requiring royalty free grants between Brunswick and Yamaha of any patent

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[34] *See, e.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

[35] The ALJ's proposed order of relief also contained a provision requiring Brunswick and Yamaha to notify the Commission of significant changes in their corporate structure. Paragraph VII. This provision is necessary to ensure effective monitoring of Brunswick and Yamaha's compliance with the order.

[36] *Brunswick Corp.* [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) ¶21,623 at 21,788.

[37] Paragraph VII of Complaint Counsel's Proposed Order. CCRAB, Attachment A, p. 3.

rights or licenses utilized by the joint venture; and (2) establishing as joint property any other technical information exchanged during the joint venture.[38]

The ALJ concluded that neither the imposition of the supply requirements nor the grants of access to patented and nonpatented technology were necessary to protect Mariner dealers. We accept that conclusion. There is no convincing evidence in the record that Mariner dealers will be endangered by any sudden supply shortages. Sanshin presently sells 25% of its production to Mariner dealers.[39] It seems unlikely that Yamaha would readily relinquish so substantial a source of profit. And, even if Sanshin's sales to Mariner dealers did decrease somewhat, the record shows that Brunswick has long desired the capability of satisfying the needs of Mariner dealers from its own production, and has been preparing that capability throughout the life of the joint venture.[40] In light of this evidence we conclude that Mariner dealers face no significant danger from our termination of this joint venture.

August 14, 1980

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[38] Paragraph IV of Complaint Counsel's Proposed Order. CCRAB, Attachment A, p. 2.

[39] RDF 66.

[40] *See, e.g.*, IDF 199; RDF 74-77. Brunswick has taken the position on this appeal that it is "prepared to supply Mariner if necessary." BRRB p. 6.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Michael Pertschuk, Chairman
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of	)	
	)	
BRUNSWICK CORPORATION, a corporation;	)	
	)	DOCKET NO. 9028
YAMAHA MOTOR CO., LTD., a corporation; and	)	
	)	
MARINER CORP., a corporation.	)	
	)	

FINAL ORDER

For the purposes of this Order:

a) "Brunswick" shall mean the Brunswick Corporation, together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations (including Mariner Corp.), and corporations controlled by Brunswick Corporation; and all successors to Brunswick Corporation and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Brunswick Corporation.

b) "Yamaha" shall mean Yamaha Motor Co., Ltd., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations,

and corporations controlled by Yamaha Motor Co., Ltd., and all successors to Yamaha Motor Co., Ltd. and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Yamaha Motor Co., Ltd.

c) "Mariner" shall mean Mariner Corp., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations, and corporations controlled by Mariner Corp.; and all successors to Mariner Corp. and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Mariner Corp.

I.

IT IS ORDERED that within 90 days of the date this Order becomes final, Brunswick and Mariner shall sell to Yamaha, and Yamaha shall buy from Brunswick and Mariner, all capital stock, bonds, debentures, and other securities and other interests held by Brunswick and Mariner in Sanshin Kogyo Co., Ltd. ("Sanshin"). The purchase price shall be equal in dollars to the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale.

II.

IT IS FURTHER ORDERED that, on or before 90 days from the date this Order becomes final, Brunswick, Yamaha, and Mariner shall rescind in all respects the Joint Venture Agreement, and the agreements attached thereto, entered into on November 21, 1972, and all agreements modifying the Joint Venture Agreement and the agreements attached thereto, shall consider them null and void, and shall cease and desist from observing or enforcing the terms of said agreements.

III.

IT IS FURTHER ORDERED that from the date this Order becomes final, Brunswick and Mariner shall cease any and all representation on the board of directors of Sanshin, cease and desist from taking any steps to nominate, seat, or admit any representatives of Brunswick and Mariner to the board of directors of Sanshin, and cease and desist from exercising any of the rights of a shareholder of Sanshin except the right to receive dividends.

IV.

IT IS FURTHER ORDERED that from the date this Order becomes final, neither Brunswick nor Mariner shall enter into, continue to be a party to, or enforce any agreement which in whole or in part prevents a manufacturer, seller, or distributor of outboard motors from manufacturing, selling, or distributing such motors in the United States, its territories or possessions.

V.

IT IS FURTHER ORDERED that from the date this Order becomes final, Yamaha shall not enter into, continue to be a party to, or observe any agreement which in whole or in part prevents Yamaha from manufacturing, selling, or distributing outboard motors in the United States, its territories or possessions.

VI.

IT IS FURTHER ORDERED that Brunswick, Yamaha, and Mariner shall, for a period of three years from the date this Order becomes final, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade

Commission, all or any part of the stock or share capital of any concern, corporate or noncorporate, engaged in the production, distribution or sale of outboard motors in or for the United States, or capital assets pertaining to such production distribution or sale of such motors in or for the United States.

VII.

IT IS FURTHER ORDERED that Brunswick, Yamaha, and Mariner notify the Federal Trade Commission at least 30 days prior to any proposed change in its corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any change in the corporation which may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that Brunswick, Yamaha, and Mariner shall within 120 days of the date this Order becomes final, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Brunswick, Yamaha, and Mariner each intends to comply or has complied with this Order. Brunswick, Yamaha, and Mariner shall submit such other information as may from time to time be requested by the Commission.

By the Commission. Commissioner Bailey did not participate.

SEAL

/s/ James A. Tobin
James A. Tobin
Acting Secretary

ISSUED: August 14, 1980

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9028

In the Matter of
BRUNSWICK CORPORATION,
a corporation,
YAMAHA MOTOR CO., LTD.,
a corporation,
and
MARINER CORP.,
a corporation.

Recommendation To The Commission

James P. Timony
Administrative Law Judge

March 14, 1980

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
BRUNSWICK CORPORATION, a corporation,	)	
YAMAHA MOTOR CO., LTD., a corporation,	)	DOCKET NO. 9028
MARINER CORP., a corporation.	)	

INITIAL DECISION

James P. Timony, Administrative Law Judge

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Introduction

The complaint in this matter alleged that a joint venture agreement between Brunswick Corporation ("Brunswick") and Yamaha Motor Co., Ltd. ("Yamaha") violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The complaint alleged a substantial lessening of potential competition and unlawful effects of the joint venture upon the manufacture and sale of outboard motors in the United States.[1] The initial decision dismissed the complaint.

On November 9, 1979, the Commission reversed the initial decision, holding that the Joint Venture Agreement substantially lessened actual competition as well as potential competition. The Commission held that the joint venture violated the antitrust laws by eliminating the likely independent entry by Yamaha into the United States market, and by eliminating actual existing competition provided by Yamaha in the United States market. The Commission also found that a series of collateral agreements constituted an unlawful limitation of competition between Yamaha and Brunswick. The Commission remanded for additional evidence solely on the question of formulating an appropriate remedy.

The Commission's intent is to restore Yamaha to its 1972 position as an actual and a potential competitor in the United States market. The Commission's Opinion re-

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[1] The Joint Venture Agreement provides that Yamaha and Brunswick each own equal shares of stock in Sanshin Kogyo Company Limited ("Sanshin") which manufactures outboard motors to be sold by Mariner Corp. ("Mariner") a subsidiary of Brunswick. Mariner sells the motors throughout the world, including the United States market. Yamaha sells the motors in Japan and elsewhere in the world on a nonexclusive basis except in Australia and North America.

quires that the joint venture be terminated and the restrictive agreements enjoined. The Opinion calls for evidence of what, if any, related or additional relief may be required. As examples of the evidence sought the Commission stated: (Opinion at pp. 30-31)

> "The Mariner brand will revert to Brunswick should the joint venture simply be terminated and no other provisions adopted; distributors carrying that brand would naturally continue to look to Mariner for supply. We do not know, however, whether Mariner has access to manufacturing capacity aside from Sanshin to service its line. Nor do we know how many dealers Mariner has, whether they are on one-year contracts, whether they may or do carry more than one line of motors, whether they could easily switch to Yamaha as a source of supply, and so on."

The remedy hearing took place on February 19 and February 20, 1980. Three witnesses testified, and 23 exhibits were introduced. Based on this and previously introduced evidence, I find as follows:[2]

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[2] The findings of fact are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding. The findings of fact include reference to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX — Commission's Exhibit, followed by number of exhibit being referenced.

BX — Respondents Brunswick and Mariner's Exhibit, followed by number of exhibit being referenced.

YX — Respondent Yamaha's Exhibit, followed by letter of exhibit being referenced.

tr. — Transcript, preceded by the name of the witness followed by the page number.

Findings of Fact

1. The Joint Venture Agreement and collateral agreements between Brunswick and Yamaha preclude Yamaha's entry into the United States outboard motor market until April 30, 1983 (CX 1-K; CX 1-R).

2. By letters dated November 9, 1979, Yamaha gave notice to Brunswick and Mariner that the Joint Venture Agreement "shall be terminated upon expiration of the current term . . . ." (BX 51, BX 52). By letter dated November 20, 1979, Brunswick acknowledged termination of the Joint Venture Agreement effective as of the end of business on April 30, 1983, and termination of the technical assistance agreement on April 9, 1983 (BX 53).

3. The provisions of the joint venture and collateral agreements restricting Yamaha's entry into the United States outboard motor market remain in effect until the agreements are terminated (CX 1; Anderegg tr. 1311; Watanabe tr. 1089-90).

4. Sanshin is Yamaha's only source of outboard motors (Watanabe tr. 993). Sanshin presently produces engines for Yamaha. The smallest is 2 horsepower. The largest is 85 horsepower (Watanabe tr. 993).

5. In 1979, Yamaha sold 160,000 units of outboard motors under the "Yamaha" brand, with 120,000 of these units sold outside of Japan (Watanabe tr. 997).

6. The trend toward higher horsepower outboard motors has continued, and the Mercury division of Brunswick now sells a 300 horsepower engine. The high horsepower range of outboard motors now starts at about 70 to 75 horsepower (Anderegg tr. 1253, 1337-38).

7. In 1979, there were about 375,000 units sold in the United States outboard motor market (Watanabe tr. 1004-05; Anderegg tr. 1208). In 1978 there were about 450,000 sold in that market (Anderegg tr. 1208).

8. The major manufacturers of outboard motors in the United States generally market motors from 2 to 300 horsepower (Watanabe tr. 1005). Mercury markets a "full line" of outboard motors from 3.6 to 300 horsepower (Andregg tr. 1253).

9. Yamaha is presently selling motorcycles, snowmobiles, sailboats and generators in the United States market. These products are generally sold to Yamaha Motor Company, U.S.A. ("YMUS"), the stock of which is 100% owned by Yamaha Motor Co., Ltd. YMUS is the sole distributor of these products in the United States market (Watanabe tr. 991).

10. Yamaha provides assistance to YMUS in developing and implementing marketing strategies in the United States market (Watanabe tr. 992). Yamaha also provides assistance in determining sales policies and pricing of products distributed by YMUS in the United States (Watanabe tr. 991-92).

11. Yamaha will enter the United States outboard motor market once the Joint Venture Agreement with Brunswick is terminated (Watanabe tr. 1008, 1103). It would take Yamaha one year to begin to sell in the United States market (Watanabe tr. 1008).

12. YMUS is the company which will be directly responsible for the marketing of Yamaha outboard motors in the United States (Watanabe tr. 992). YMUS will set up an independent dealer network for the distribution of outboard motors in the United States (Watanabe tr. 1055, 1083).

13. It will take YMUS about three months to set up the internal organization required for the marketing of outboard motors in this country (Watanabe tr. 1008-09, 1042).

14. Yamaha has been approached by dealers who have expressed interest in carrying Yamaha brand outboard motors when these products are marketed in the United States (Watanabe tr. 1006). These dealers have included marine dealers, Yamaha motorcycle and snowmobile dealers, and sporting goods dealers (Watanabe tr. 1008).

15. Yamaha intends to establish dealers in the United States who are best suited to promote the Yamaha outboard motor line, and may include dealers who carry motorcycles and snowmobiles (Watanabe tr. 1007, 1019, 1084-85).

16. Yamaha plans on setting up a dealer network of up to 300 independent dealers the first year that Yamaha markets outboard motors in the United States (Watanabe tr. 1019).

17. Yamaha will not take affirmative steps to enter the United States outboard motor market such as taking market surveys or contacting prospective dealers, as long as the joint venture agreement is in effect (Anderegg tr. 1311; Watanabe tr. 1022; 1089-90, 1043-44).

18. Yamaha intends to market 10,000 units in the United States market in its first full year after entry and increase these sales to 20,000 and 30,000 units, respectively, after the second and third years (Watanabe tr. 1024-25; 1077-78).

19. Yamaha now sells outboard motors from 2 horsepower to 85 horsepower (Watanabe tr. 1017, 1071-72).

20. The United States is the largest market in the world for high horsepower engines (Anderegg tr. 1253-54, 1312). The larger horsepower engines are more profitable both for the manufacturer and the dealer (Anderegg tr. 1254). The ability of Yamaha to become a more successful competitor in the United States market would be enhanced by its production of higher horsepower engines (Watanabe tr. 1011, 1016-17, 1072; Anderegg tr. 1249, 1252-53).

21. The addition of any new product, including high horsepower engines, to Sanshin's product line currently requires the approval of the Brunswick directors on the Sanshin board of directors (Anderegg tr. 1296; Watanabe tr. 1013-14; Nakagawa tr. 1109, 1112). It would be easier for Yamaha to have Sanshin develop new products if Brunswick directors were not on the board (Nakagawa tr. 1119).

22. In December 1977 Brunswick conditioned its acceptance of Sanshin's development of the 85 horsepower engine that Yamaha had requested on Yamaha's promise not to pursue its request for Sanshin's development of stern drive engines (Anderegg tr. 1328; Nakagawa tr. 1118-19).

23. In 1978, Yamaha proposed that Sanshin produce a 115 horsepower engine (Watanabe tr. 1011). In a meeting with Yamaha in January 1980, Mr. Reichert, the President of Brunswick and a Sanshin director, stated that he would like to approve the tooling for 115 horsepower engine immediately but that he had to consider Brunswick's position in the matter (Nakagawa tr. 1113). On February 15, 1980, Brunswick conditioned its acceptance of the tooling of the 115 horsepower engine, *inter alia*, on Yamaha's willingness to continue to supply Mariner with engines through 1983 and parts for seven years therafter (YX-1).

24. Yamaha recently has proposed to the Yamaha directors on the Sanshin board that Sanshin develop engines over 115 horsepower up to 200 horsepower (Watanabe tr. 1069-71; Nakagawa tr. 1186).

25. Access to the United States market will lower Sanshin's unit cost of production for its larger horsepower motors making Yamaha a stronger outboard motor competitor both abroad and in the United States (Nakagawa tr. 1154-55).

26. At present Sanshin is supplying Mariner with outboard motors from 2 horsepower to 60 horsepower. Mercury is supplying Mariner with outboard motors from 70 horsepower up to 200 horsepower (Nakagawa tr. 1155).

27. It will take several years for Sanshin to develop large horsepower engines in the 175 to 200 horsepower range (Watanabe tr. 1071). Yamaha presently cannot begin production of the higher horsepower engines without Brunswick's consent (Andregg tr. 1296; Nakagawa tr. 1109, 1112; Watanabe tr. 1013-14).

28. Article 21 of the Articles of Incorporation and Article 5.2 of the Joint Venture Agreement enumerate certain business matters that are to be considered "fundamental" (CX 1-H, I; CX 1-Z-1, 2; Nakagawa tr. 1109). These include:

a. Approval of the financial and operating budgets of Sanshin including the borrowing and lending of funds (Nakagawa tr. 1109; CX 1-I, CX 1-Z-1);

b. Approval of the acquisition of patents, trademarks and important technology by Sanshin or grants by Sanshin of any such rights to another entity (Nakagawa tr. 1109; CX 1-I, CX 1-K-1);

c. Approval of the expansion (or discontinuance) of Sanshin's product line (Nakagawa tr. 1109; CX 1-I, CX 1-Z-1) including the production of any new engine (Anderegg tr. 1296; Watanabe tr. 1013-14);

d. Approval of the issuance or transfer of shares of stock of Sanshin (CX 1-I, CX 1-Z-1); and,

e. Approval of any material change or any other important policy of Sanshin not in the ordinary course of business (Nakagawa tr. 1110, CX 1-I, CX 1-Z-2).

29. Article 5.2 of the Joint Venture Agreement states that fundamental matters can only be adopted by an affirmative vote of seven directors (CX 1-I).

30. Article 4.1 of the Joint Venture Agreement mandates that Sanshin will have eleven directors, six appointed by Yamaha and five appointed by Brunswick (CX 1-H).

31. Thus to take action in any way on "fundamental matters" at least one Brunswick director must vote with the Yamaha directors. Brunswick appointees to the Sanshin board vote as a block on matters involving Sanshin's operations (Anderegg tr. 1296-98). This gives Brunswick veto over the policies of Sanshin (Nakagawa tr. 1109-10; Anderegg tr. 1234).

32. The primary reason Brunswick wishes to be on the Sanshin board is to participate in the fundamental and important decisions that affect the future of Sanshin and Brunswick (Anderegg tr. 1234).

33. Members of the Sanshin board of directors have access to Sanshin's production, sales, and shipments data (Anderegg tr. 1232-34), as well as profits and costs of each product (Nakagawa tr. 1120).

34. The power of Brunswick to approve (or disapprove) financial and operating budgets of Sanshin is very important to Sanshin. It includes the power to control the production budget, profit budget, expense budget and capital expenditures budget (Nakagawa tr. 1111).

35. The power of Brunswick to approve (or disapprove) the acquisition and transfer of patents is very important to Sanshin (Nakagawa tr. 1111). Without development of new products or improvement of its product line, Sanshin will not be able to compete with other outboard motor manufacturers (Nakagawa tr. 1111-12).

36. The power of Brunswick to approve (or disapprove) the expansion or discontinuance of a Sanshin product line is very important to Sanshin (Nakagawa tr. 1112). Brunswick's approval is necessary at three stages. The first stage is approval for the start of development, the second is the approval of a prototype, and the third is the approval of investment for tooling. Each step requires Brunswick's approval (Nakagawa tr. 1112).

37. Yamaha produced outboard motors at Yamaha facilities until May 1969, when it purchased control of Sanshin. Sanshin was controlled by Yamaha from that time until the joint venture was consummated (Anderegg tr. 1282). At that time it transferred Yamaha tooling and equipment for outboard motor production to the Sanshin facility (Yamaha Motion to Dismiss, para. 2, October 20, 1975; Yamaha Amended Answer, para. 2; CX 1-A).

38. From 1969 to 1972, Yamaha through its subsidiary company, Sanshin, produced all "Yamaha" brand outboard motors which were sold by Yamaha (Yamaha Amended Answer, para. 2; Eguchi tr. 665, 667; CX 1-A). In the fiscal year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha, of which 25,000 were exported (Yamaha Amended Answer, para. 2). In 1973, Sanshin produced approximately 80,000 outboard motor units (Eguchi tr. 669).

39. In 1972, Sanshin manufactured outboard motors only for Yamaha. The brand name was "Yamaha" and they were sold as "Yamaha" outboard motors (Anderegg tr. 772).

40. On November 21, 1972, Brunswick entered into an agreement with Yamaha wherein it was provided that Mercury Marine International Co. (now "Mariner"), a wholly-owned subsidiary of Brunswick, would be formed to

purchase 62,000 shares of newly issued Sanshin stock for approximately $1.4 million (Brunswick Amended Answer, para. 15; Yamaha Amended Answer, para. 9).

41. With the purchase of 62,000 shares of Sanshin stock, Brunswick and Yamaha each owned 38% of the total outstanding stock of Sanshin; the remaining 24% of the Sanshin stock is held by individual Japanese shareholders (Brunswick Amended Answer, para. 15; Yamaha Amended Answer, para. 9; Nakagawa tr. 1120-21).

42. According to Article 343 of Japanese Commercial Code, the Articles of Incorporation of a Japanese corporation may only be amended by a two-third vote (CX 124-L; CX 126-D).

43. Article 5 of the Articles of Incorporation states the amount of the authorized capital of Sanshin (CX 1-V).

44. Thus, if Sanshin wished to amend its Articles to change its authorized capital, it could not do so without approval of Brunswick if Brunswick is permitted to retain its present 38% share of Sanshin stock (Nakagawa tr. 1121-22).

45. The inability to increase authorized capital is a severe handicap to the future expansion of a company (Nakagawa tr. 1122).

46. Article 2 of Sanshin's Articles of Incorporation lists the products Sanshin is authorized to manufacture (CX 1-U).

47. If Sanshin wished to manufacture any other product, it would need to amend its Articles and Brunswick could block such a change.

48. Articles 245 and 343 of the Japanese Commercial Code permit Brunswick, as a holder of over one-third of all Sanshin stock, to block any acquisition by Sanshin (CX 124-K, L; CX 126-E; Nakagawa tr. 1126).

49. In addition to the above powers, Brunswick as the holder of more than one-third of Sanshin's stock has the ability to injure Sanshin (and Yamaha) by blocking stock dividends (CX 126-D); blocking transfer of Sanshin to another entity (CX 126-D); blocking mergers and amalgamations, (CX 126-E); blocking the issuance of new shares, (CX 126-E) and more (CX 126-D-E, H).

50. Brunswick holds over 38% of the Sanshin stock. Yamaha owns 38% of Sanshin, and the balance of 24% is held by third parties (Nakagawa tr. 1120-21).

51. Of the balance held by individual stockholders, some is held by present and former Yamaha employees, and some is held by individuals not identified with any party (Nakagawa tr. 1121). In 1972 Yamaha tried to purchase the Sanshin shares held by these individuals, but they refused to sell (CX 9-H).

52. If Yamaha cannot control a majority of Sanshin shares, as is the case now, it could not effectively control Sanshin. To accomplish any goals or objectives, including sufficient production to enable entry into the United States market, it would need the votes of more than half of the shares (CX 126).

53. As a shareholder of Sanshin, Brunswick has access to information about Sanshin's operations that would not otherwise be disclosed to it (Anderegg tr. 1242). This information includes financial information, balance sheets, construction in progress, appropriated surplus, income statements, profitability data, proposals relating to reserves, proposals relating to the distribution of profits and/or interest, schedules of the inventory, and minutes of the board of directors' meetings (CX 126-Q; CX 124-N, O; Nakagawa tr. 1129).

54. The information received at Sanshin board of directors' meetings is important to Brunswick (Anderegg tr. 1232-33).

55. This information includes competitively sensitive data. (Anderegg tr. 1235).

56. Minutes of board meetings reflect the discussions held at these meetings and Brunswick receives these minutes (Anderegg tr. 1234-35).

57. Article 2.3 of the Joint Venture Agreement provides a formula used to arrive at the original price paid by Brunswick to Yamaha for the Sanshin stock:

> "The price per share of Sanshin stock . . . shall be equal to the value of the net tangible assets per share, computed and adjusted to the last day of the six (6) month term immediately preceding the Purchase Date . . . ." (CX 1-C).

Article 3.2(b) of the Joint Venture Agreement uses the same formula for any subsequent sale of the stock to the other joint venture partner:

> "If either party intends to sell or transfer any of its shares of Sanshin, it shall notify the other party in writing of such intention, the number of shares involved and the circumstances of such proposed sale or transfer. The other party shall have the option to purchase the shares which are to be sold or transferred, such option to be exercised within sixty (60) days after receipt of such notice. The price per share payable upon the exercise of such option shall be determined in the manner provided in Section 2.3 hereof." (CX 1-G)

58. During the course of the joint venture, there was a free exchange of technology by the parties which substantially benefited both Yamaha and Mercury (Anderegg tr. 1280-81).

59. Due to the difficulty of measuring the relative value of each party's contribution of technical know-how and patented technology, the parties agreed to contribute technology to the joint venture with no value assigned (Anderegg tr. 1278). The parties agreed that Sanshin would pay equal royalties of 1.5% of its sales to Brunswick and Yamaha for use of the technology (Anderegg tr. 1281; CX 1-Z-8; CX 1-Z-20). The parties also agreed that Brunswick and Yamaha would pay each other annual royalties of $25,000 for the use of technology (CX 1-Z-33).

60. The technical assistance agreements contemplated that at the end of the joint venture, the parties would reach agreement with respect to the continued use of patented technology contributed to the joint venture (CX 1-Z-10; CX 1-Z-21; CX 1-Z-36).

61. There are 65 Yamaha or Yamaha/Sanshin patents used in the production of Sanshin engines sold to Mariner (Nakagawa 1138-39). Mercury will not need these patents after the joint venture is terminated (Brunswick's proposed findings, p. 6 footnote).

62. During the course of the Joint Venture Agreement, Sanshin sent Brunswick almost 4,000 design drawings of the engines produced by Sanshin (Nakagawa tr. 1136). Sanshin also sent Brunswick cost breakdowns on engines produced by Sanshin (Nakagawa tr. 1136-37). Brunswick technicians and other personnel have made more than 100 visits to Sanshin and Yamaha facilities (Nakagawa tr. 1156).

63. Sanshin is currently using five Brunswick patents in its production of outboard motors (Nakagawa tr. 1139). One patent is used in Sanshin's 15 horsepower motor, two more are used in its 55 horsepower engine and two are used in Sanshin's 85 horsepower engine (Nakagawa tr.

1139). Sanshin also intends to use three Brunswick patents in its 115 horsepower engine when it is produced by Sanshin (Nakagawa tr. 1139-40, 1171).

64. Yamaha does not have facilities to test higher horsepower outboard engines at their top speeds. Such testing is conducted at Mercury facilities at "Lake X" in Florida (Watanabe, tr. 1103-04).

65. It would take Yamaha about three to four years to develop technology around the Brunswick patents (Nakagawa tr. 1141).

66. Twenty-five percent of Sanshin's present production is sold to Mariner (Nakagawa tr. 1134).

67. Sanshin's production capacity is presently 250,000 units annually (Nakagawa tr. 1135). Sanshin produced 210,000 units for the period of May 1979 to April 1980 (Nakagawa tr. 1135). For the period of May 1980 to April 1981, Sanshin's production plans call for the manufacture of 220,000 units (Nakagawa tr. 1135).

68. Sanshin's plant is operated predominently on a one-shift basis (Nakagawa tr. 1135). By adding more shifts, Sanshin can increase its plant capacity by 10-15% over its present 250,000 unit capacity (Nakagawa tr. 1135).

69. There is no provision in the Joint Venture Agreement which requires Sanshin to supply Brunswick with a minimum amount of engines (Nakagawa tr. 1134). Also, the Joint Venture Agreement does not give Brunswick the right to purchase engines from Sanshin after the 1983 termination of the Joint Venture Agreement (Nakagawa tr. 1136).

70. The Joint Venture Agreement does not set a specified price for Sanshin's engines (CX 1-L). During the joint venture, the price of Sanshin's engines to Brunswick

and Yamaha is determined by Sanshin's board of directors (Watanabe tr. 994, 995). Sanshin's price of engines to Yamaha and Brunswick has been identical (Watanabe tr. 995).

71. Yamaha has no obligation under the Joint Venture Agreement to supply spare parts to Mariner after the 1983 termination (Nakagawa tr. 1136, 1157-58).

72. It is a general industry practice to supply spare parts to marine dealers for a period of five to seven years after a product is discontinued (Nakagawa tr. 1136; Anderegg tr. 1259, 1263; CX-82-D).

73. During the joint venture, Yamaha purchased Sanshin's entire production of spare parts (Watanabe tr. 995). Yamaha then sold these spare parts to Mariner and other companies (Watanabe tr. 996). Yamaha had three different prices for its spare parts (Watanabe tr. 965). Mariner was afforded the best price (Watanabe tr. 996).

74. Mercury has been gearing up internally to supply the Mariner line in the future (Anderegg tr. 1310). Mercury has taken steps to increase its capacity to supply the Mariner outboard motor line by shifting its stern drive production to Stillwater, Oklahoma (Anderegg tr. 1256). This move has freed additional capacity for outboard motor production in Mercury's Wisconsin plants (Anderegg tr. 1256). Mercury also has underway a program to further increase capacity by reducing costs and speeding production at its Wisconsin outboard plants (Anderegg tr. 1256-57). In addition, most Mercury plants are not operating at capacity at the present (Anderegg tr. 1258).

75. The prospect of early termination of the Joint Venture Agreement has not had an effect on Mariner's marketing plans (Anderegg tr. 1247). Mariner has assured its dealers that there will be continuity in the supply of engines (Anderegg tr. 1261).

76. Mariner had expected from the outset of the joint venture that the agreement would be terminated after the initial ten-year period (Anderegg tr. 1254). In fact, in 1974, Robert Anderegg, the Vice President of the Mercury Division and the General Manager of Mariner, believed that it was essential that Mercury be positioned to supply the entire Mariner line from Mercury plants by 1979 (Anderegg tr. 1259; CX-81). Mariner's 1979 three year plan anticipates a gradual increase in Mercury's supply of the Mariner line (YX-3).

77. It is the intention of Brunswick to supply the bulk of the Mariner line from the Mercury plants in the future (Anderegg tr. 1262-63, 1305-06). By 1982, Mariner hopes to decrease its dependence on Sanshin for the lower horsepower models by about 50% (Anderegg tr. 1305, 1310).

78. In 1979, overall industry sales of outboard motors decreased 17% from the previous year due to fuel shortages and rising fuel prices, high interest rates which affect financing of dealer inventories, and proposed government restrictions on weekend outboard motor usage (Anderegg, tr. 1207-08). In 1979, Mariner increased its dollar sales, unit sales, and number of dealers (Anderegg, tr. 1205-08; BX 67, 68, 69).

79. In 1978, Mariner sold 10,813 units in the United States market. In 1979, Mariner sold 12,725 units in the United States market (BX 68). In that year Mariner's sales of $13,440,000 gave it 3% of the market (BX 67, BX 70).

80. The Mariner line was introduced at slightly lower prices for the lower horsepower motors (Anderegg tr. 135-36). The Mariner dealers have been "a little hungrier" than their competitors. "They have been more apt to make a deal" (Anderegg tr. 1335). Mariner has cut the price of outboard motors sold in competition with Yamaha in Europe (Watanabe tr. 1086-87).

81. Mariner is the first new major outboard motor brand in modern time. It is now one of the five major brands in the United States market (Anderegg tr. 1201).

82. Mariner now has 405 dealers. Mariner dealers sign two-year nonexclusive franchise contracts, but Mariner prefers that its dealers remain "loyal" to the brand (Anderegg, tr. 1331-33). In 1979, of Mariner's 405 dealers, 33 sold other outboard lines (Anderegg, tr. 1227, CX 127-B), and three also sold the Mercury brand (Anderegg, tr. 1229, CX 128-B).

Discussion

By letter of November 9, 1979, Yamaha gave notice to Brunswick that the joint venture would terminate on April 30, 1983 (finding 2).[3] The fact that the joint venture and collateral restrictions will now expire by agreement of the parties does not obviate the need for a remedy order. If Yamaha is to enter the United States market before that time, the agreement must be terminated by Commission order.

To insure that Yamaha is an actual and potential competitor in the United States market in at least as vigorous a form as it was in 1972, it is sufficient to delete the provisions of the Joint Venture Agreement prohibiting Yamaha from entering the market. Those parts include the covenants not to compete, and the parts providing for Brunswick ownership of stock in Sanshin and appointing directors to its board. If the directors appointed by Brunswick remain on Sanshin's board, they may block Yamaha's efforts to enter the United States market. On the other

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[3] The fact that both the Commission's Order reversing the initial decision and the Yamaha letter were dated November 9, 1979 was coincidental. Yamaha was not served with the Commission's Order until December 10, 1979.

hand, if the Brunswick directors are removed but Brunswick retained the stock in Sanshin[4] Yamaha, with control of Sanshin, might purposely devalue the stock by obtaining assets from Sanshin at minimal cost. Furthermore, the stock in Sanshin now owned by Brunswick must be sold to Yamaha, rather than to the highest bidder, in view of the Commission's goal of achieving immediate successful entry by Yamaha into the United States market. Any other buyer might exercise the same veto power over Sanshin now enjoyed by Brunswick, and Yamaha, which controlled Sanshin before the joint venture, must be restored to that position, to insure its incentive for prospective entry into the United States market.

The recommended order provides for termination of the joint venture and collateral restrictive agreements; immediate removal of Brunswick-appointed directors from the Sanshin board; and early divestiture to Yamaha of Brunswick stock in Sanshin.

A. *Divestiture*

The Federal Trade Commission has authority to order divestiture as a remedy for a violation of Section 7 of the Clayton Act. *Luria Bros.* v. *FTC*, 389 F.2d 847, 865 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968); *cf. FTC* v. *Dean Foods Co.*, 384 U.S. 597, 606 n.4 (1966); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 312-313 nn.17-18 (1963). There is a strong presumption that diverstiture is necessary to redress a violation of Section 7 of the Clayton Act, which may be rebutted only by clear and convincing proof that alternative relief would restore competition to markets affected by the illegal acquisition. *Diamond Alkali Corp.*, 72 FTC 700 (1967).

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[4] The Joint Venture Agreement is silent as to disposition of Brunswick's Sanshin stock upon termination of the agreement.

The fact that Brunswick owns only 38% of the shares of Sanshin stock does not overcome the strong presumption in favor of the divestiture of Sanshin stock. *Retail Credit Co.*, 92 FTC 1, 161 (1978). Divestiture of less than 38% of the stock of a company has been ordered where an acquisition violated Section 7 of the Clayton Act. *United States* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961) (23%).[5] Further, if the Commission order permits Brunswick to retain its Sanshin stock as an investment, but prohibits Brunswick from appointing directors to Sanshin's board, Brunswick would have the right as a substantial shareholder to veto Yamaha's efforts to enter the United States market (findings 28-36, 41-52) and to have access to competitively sensitive information (findings 53-56).

For these reasons Brunswick's stock in Sanshin should be divested. The stock should be sold to Yamaha. Other likely purchasers might be competitors who may be expected to exercise the same veto power that Brunswick now exercises, and hinder Yamaha's entry into the United States market.

The sale price of the stock should follow the formula negotiated by the parties to the joint venture agreement which was to be used in the event of a voluntary sale of the stock (finding 57). The parties specified that in the event of a sale of Sanshin stock by one party to the other, the price would equal the value of the net tangible assets per share computed and adjusted to the last day of the six month term immediately preceding the date of the pur-

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[5] *See, e.g., Gulf & Western Industries* v. *Great A&P Tea Co.*, 476 F.2d 687 (2d Cir. 1973) *supra*, (19%); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958) (23%); *United Nuclear Corp.* v. *Combustion Engineering*, 302 F. Supp. 539 (E.D. Pa. 1969) (21%).

chase (CX 1-C, 1-G). Yamaha argues that the term should run from the date of notification of termination, saying that a later date will unjustly enrich Brunswick and discourage investment by Yamaha. The converse of the argument is that use of the date before the termination notice will discourage new investment by Mariner and unjustly enrich Yamaha. On balance, it appears equitable to use the later date, which has been agreed to by the parties to the Joint Venture Agreement.

Brunswick argues that it be allowed to keep the Sanshin stock as an investment. If this arrangement were approved, Brunswick directors should not serve on the Sanshin board, for the reasons noted above. In that event, the Commission would become involved in business decisions of Sanshin to insure that Brunswick's right to receive dividends was not impaired.[6] Furthermore, this type of "pass through" arrangement, as an attempt to reduce the impact of divestiture, has been rejected. In *United States* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316, 331 (1961), the Court held:

> "The divestiture only of voting rights does not seem to us to be a remedy adequate to promise elimination of the tendency of duPont's acquisition offensive to § 7. [sic] Under the decree, two-thirds of du Pont's holdings of General Motors stock will be voted by du Pont shareholders . . . . Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate community of interest which we found to violate the law. The du Pont shareholders will *ipso facto* also be General Mo-

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[6] For example, if Brunswick held stock in Sanshin but were not represented by directors, Yamaha would be free to devalue Sanshin stock by using its control of Sanshin to obtain Sanshin assets at minimal cost.

tors voters. It will be in their interest to vote in such a way as to induce General Motors to favor du Pont, the very result which found illegal on the first appeal."

B. *Directors*

The recommended order requires that Brunswick immediately cease its influence over Sanshin policy through the directors it has appointed to Sanshin's board, pending sale of Brunswick's 38% share of Sanshin stock to Yamaha. Without this provision, the directors appointed by Brunswick will continue on the Sanshin board as long as Brunswick owns Sanshin stock. The affirmative vote of those directors is necessary for Sanshin to prepare for entry into the United States market, such as manufacture of new products, development and acquisition of patents and technology, and fiscal matters (findings 21, 28-36, 42-49). These directors consider the best interest of Brunswick while voting on Sanshin policy (finding 32). They have access to information about Sanshin's operations, including production, sales, shipment, profit, and cost data, which is beneficial to Brunswick as a competitor (findings 33, 53, 54). The Brunswick directors must be removed forthwith.

C. *Patent Licensing and Mandated Supply*

Both Yamaha and Brunswick would like, in part, to continue the joint venture until April 30, 1983. Brunswick argues that there must be a sufficient "wind down" period preceding the termination of the joint venture, during which Sanshin continues to supply outboard motors for the lower horsepower and of Mariner's line. Yamaha argues that it must have the use of seven Brunswick patents if it is to be able to continue to supply Mariner and to enter the United States market independently in the near future. If it does not retain the use of the patents, the

argument goes, its plans to enter will be delayed for two or three years until Yamaha engineers are able to design "around" the Brunswick patents (finding 65).

Yamaha's need for the Brunswick patents, in my opinion, was exaggerated by the witnesses who testified for that company. If Yamaha's need for the Brunswick patents is so pressing, to continue to supply Mariner as well as to sell Yamaha engines throughout the world, Yamaha's termination of the joint venture defies logic.

While it may be more convenient for both parties if the joint venture ceases gradually, as provided in the agreement, I do not believe that harm will befall the Mariner dealers or either party to the agreement if it is rendered null earlier than its scheduled termination. For years, both parties have been planning to terminate the joint venture early (findings 74-77).[7] Furthermore, they both have a commercial interest in winding the venture down gradually. Yamaha *wants* to continue using the Brunswick patents and Brunswick is willing to bargain (Brunswick Response at p. 11). Brunswick *wants* to continue buying outboard motors produced by Sanshin and Yamaha is willing to sell them, as well as to supply spare

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[7] "Both parties expect the joint venture to end in 1979 (Findings 196, 199). Yamaha has obtained vital technical information from Mercury. At the end of the joint venture, Mariner dealers in the United States will be ideal distributors for Yamaha outboards, since they will have been selling identical engines, with only the decal and color different from Yamaha outboards (Finding 198). Mercury has already decided to expand its production facilities to be able fully to provide the Mariner line by the end of the joint venture in 1979 (Finding 199)." *Brunswick Corp.*, Initial Decision at p. 92 (May 2, 1977).

parts (tr. 947-48).[8] During the course of the venture both parties have negotiated in good faith issues not specified in the agreement. There is no reason to believe that they cannot continue to do so (tr. 948).

With possession of the stock in Sanshin now held by Brunswick and control of the board of directors, Yamaha will be in a more favorable position for United States entry than it was in 1972, prior to the Joint Venture Agreement. Yamaha now sells high horsepower outboard motors in commercially significant numbers (finding 5). Sanshin now produces an 85 horsepower motor and the plans for a 115 horsepower are well developed (findings 4, 19, 63). By contrast, in 1972 Yamaha had no high horsepower motor.[9] Yamaha has benefited greatly from technical assistance by Mercury engineers in developing outboard motors which have been a significant entry into the United States mar-

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[8] While agreeing to supply spare parts, Yamaha argues that it should do so only for five years after April 30, 1983, and not for seven years as requested by Brunswick. Since the need for spare parts is regulated by the life of the engine, it is peculiar that Yamaha thinks less of the longevity of its outboard motors than does Brunswick. In any event, Yamaha may even agree to supply the parts for seven years (Watanabe, tr. 1159).

[9] "Without the technology supplied through the joint venture, it would have taken two or three times as long, and several years would have passed, before Yamaha would have been able to build on its own the high horsepower outboards with the features needed for the United States market. (Findings 192, 194). Yamaha certainly could not have been ready to enter the market by the beginning of 1974. The 55 h.p. outboard made by Sanshin for Yamaha—its only true high horsepower outboard—was not ready for the United States market by 1974 even after receiving help from Mercury engineers. (Finding 170)." (*Brunswick Corp., et al.*, Initial Decision, May 2, 1977, p. 90).

ket through Mariner (finding 58). No further assistance is needed to help Yamaha enter the United States outboard motor market in the near future.

D. *Miscellaneous*

Complaint counsel's proposed order would prohibit only acquisitions by Brunswick without the approval of the Federal Trade Commission for a period of ten years. Because the Commission found that both parties violated the antitrust laws, Yamaha as well as Brunswick should be included in this provision. Requiring Commission approval need not act as an entry barrier restricting Yamaha from entering the United States by making a toe hold acquisition.

Further, the length of time for the acquisition restriction has been set at three years.[10] In reversing the Initial Decision the Commission referred to the "very delicate task" in "balancing the pro-competitive and anti-competitive effects" of the joint venture (Commission Opinion dated November 7, 1979 at p. 2). This joint venture was not an obvious violation of law. The length of restriction of future acquisitions varies according to the type of violation found. Compare *Ekco Products Co.*, 65 FTC 1163, 1228 n.3 (1964) (20 year ban), *aff'd* 347 F.2d 745 (7th Cir. 1965); with *Diamond Alkali Corp.*, 72 FTC 700 (1967) (where the order included divestiture but no ban on future acquisitions).

The recommended order is limited to practices involving the sale of outboard motors. The proof of violation was limited to that product (stipulation tr. 926). No need to expand the coverage of the order has been established.

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[10] Since there was no proof that the joint venture contributed to a trend toward concentration, it may be that this provision is not necessary. *Diamond Alkali Corp.*, 72 FTC 700, 746 (1967).

The recommended order also contains prohibitions of the mutual covenants not to compete.

RECOMMENDED ORDER

For the purposes of this Order:

a) "Brunswick" shall mean the Brunswick Corporation, together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations (including Mariner Corp.), and corporations controlled by Brunswick Corporation; and all successors to Brunswick Corporation and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Brunswick Corporation.

b) "Yamaha" shall mean Yamaha Motor Co., Ltd., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations. and corporations controlled by Yamaha Motor Co., Ltd.; and all successors to Yamaha Motor Co., Ltd. and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Yamaha Motor Co., Ltd.

c) "Mariner" shall mean Mariner Corp., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations, and corporations controlled by Mariner Corp.; and all successors to Mariner Corp. and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Mariner Corp.

I.

IT IS ORDERED that within 90 days of the date this Order becomes final, Brunswick and Mariner shall sell to Yamaha, and Yamaha shall buy from Brunswick and Mariner, all capital stock, bonds, debentures, and other securities and other interests held by Brunswick and Mariner in Sanshin Kogyo Co., Ltd. ("Sanshin"). The purchase price shall be equal in dollars to the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale.

II.

IT IS FURTHER ORDERED that, on or before 90 days from the date this Order becomes final, Brunswick, Yamaha, and Mariner shall rescind in all respects the Joint Venture Agreement, and the agreements attached thereto, entered into on November 21, 1972, and all agreements modifying the Joint Venture Agreement and the agreements attached thereto, shall consider them null and void, and shall cease and desist from observing or enforcing the terms of said agreements.

III.

IT IS FURTHER ORDERED that from the date this Order becomes final, Brunswick and Mariner shall cease any and all representation on the Board of Directors of Sanshin, cease and desist from taking any steps to nominate, seat, or admit any representatives of Brunswick and Mariner to the Board of Directors of Sanshin, and cease and desist from exercising any of the rights of a shareholder of Sanshin except the right to receive dividends.

IV.

IT IS FURTHER ORDERED that from the date this Order becomes final, neither Brunswick nor Mariner shall

into into, continue to be a party to, or enforce any agreement which in whole or in part prevents a manufacturer, seller, or distributor of outboard motors from manufacturing, selling, or distributing such motors in the United States, its territories or possessions.

V.

IT IS FURTHER ORDERED that from the date this Order becomes final, Yamaha shall not enter into, continue to be a party to, or observe any agreement which in whole or in part prevents Yamaha from manufacturing, selling, or distributing outboard motors in the United States, its territories or possessions.

VI.

IT IS FURTHER ORDERED that Brunswick, Yamaha, and Mariner shall, for a period of three years from the date this Order becomes final, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, all or any part of the stock or share capital of any concern, corporate or noncorporate, engaged in the production, distribution or sale of outboard motors or capital assets pertaining to such production, distribution or sale of such motors.

VII.

IT IS FURTHER ORDERED that Brunswick, Yamaha, and Mariner notify the Federal Trade Commission at least 30 days prior to any proposed change in its corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any change in the corporation which may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that Brunswick, Yamaha, and Mariner shall within 120 days of the date this Order becomes final, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Brunswick, Yamaha, and Mariner each intends to comply or has complied with this Order. Brunswick, Yamaha, and Mariner shall submit such other information as may from time to time be requested by the Commission.

/s/ *James P. Timony*
James P. Timony
Administrative Law Judge

March 14, 1980

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Michael Pertschuk, Chairman
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of	)	
BRUNSWICK CORPORATION, a corporation;	)	
YAMAHA MOTOR CO., LTD., a corporation; and	)	DOCKET NO. 9028
MARINER CORP., a corporation.	)	

ORDER DENYING MOTION TO DISQUALIFY COUNSEL

By motion filed with the Secretary on December 26, 1979, respondents Brunswick Corporation and Mariner Corp. (hereinafter "Movants") move that the law firms of Mori and Ota and Pettit & Martin be disqualified as counsel for Yamaha Motor Company, Ltd. in this proceeding.[1] Movants contend that disqualification is required because of the actions of Ronald J. Dolan, a former Commission

[1] By motions of January 8 and 21, 1980, Movants sought a stay of the proceeding until the Commission ruled on their disqualification motion. By orders of January 18 and 23, 1980, the Commission denied these motions.

employee. For the reasons stated below, this motion is denied.[2]

I

The facts regarding this matter are set forth in Mr. Dolan's affidavits of December 14, 1979 ("Dolan Affidavit I") and January 11, 1980 ("Dolan Affidavit II"), the accuracy of which are supported by the December 14, 1979 ("Ferguson Affidavit I") and January 11, 1980 ("Ferguson Affidavit II") affidavits of John P. Ferguson; the January 9, 1980, affidavit of Jun Mori; the January 9, 1980, affidavit of Henry Y. Ota; and the December 11, 1979, affidavit of Shigeru Watanabe.

Prior to June 8, 1979, Mr. Dolan was an Assistant Director of the Commission's Bureau of Competition, and had served as the Commission's lead trial counsel in Docket No. 9028. Dolan Affidavit I ¶3. During his employment at the Commission, Mr. Dolan did not discuss with Mori and Ota either his own employment or the possibility that Pettit & Martin might serve as counsel for Yamaha. Dolan Affidavit II ¶ 16; Watanabe Affidavit ¶ 4. Mr. Dolan left the Commission's employment on June 8, 1979, and became employed by Pettit & Martin as "counsel" on July 2, 1979. In July 1979 an announcement of Mr. Dolan's employment by Pettit & Martin was sent to Jun Mori of Mori and Ota. Dolan Affidavit II ¶ 3.

On September 18, 1979, Mr. Mori telephoned Mr. Dolan and arranged to meet with him. *Id.* at ¶ 4. Mr. Dolan and Mr. Mori dined together on September 20, 1979, and Mr.

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[2] The Commission having found oral argument on this motion to be unnecessary, Movants' request for such argument is denied. Movants' motion for leave to file their reply of January 21, 1980, is granted, as is Yamaha's motion for leave to file its reply of January 22, 1980.

Dolan "broached the possibility of Pettit & Martin handling some of the Washington legal business for Mori and Ota's clients." *Id.* at ¶ 5. Mr. Mori stated that the only Washington anti-trust business then being handled by his firm was the *Brunswick* matter, in which Mori and Ota alone had represented Yamaha throughout the initial trial and appeal. Mr. Mori indicated his feeling that because of Mr. Dolan's previous involvement in the proceeding at the Commission, Mr. Dolan could not participate in any such representation. Mr. Dolan responded that Pettit & Martin could handle the matter so long as he personally was screened, and he suggested that John R. Ferguson, a Pettit & Martin partner, be asked to undertake the representation. Mr. Dolan described the nature of Mr. Ferguson's qualifications. This was the first discussion between Mr. Mori and Mr. Dolan regarding the possible representation of Yamaha by Pettit & Martin. *Id.*

At the time, the Commission had under consideration complaint counsel's appeal from the Administrative Law Judge's dismissal of the complaint in this proceeding. At their September 20, 1979, meeting, Mr. Mori asked Mr. Dolan if he knew if the Commission would soon issue its decision, and Mr. Dolan replied that he did not know, but would inform Mr. Mori if he learned anything. *Id.* On October 3, 1979, Mr. Mori called Mr. Dolan to ask again if he knew whether publication of the Commission's decision was imminent. Mr. Dolan advised Mr. Mori that "rumor had it that the Commission would s on reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." *Id.* at ¶ 6.

The Commission's opinion and order remanding this matter to the Administrative Law Judge for the taking of additional evidence was issued on November 9, 1979. Mr.

Dolan learned of the Commission's decision, and obtained a copy of it, on November 16, 1979. *Id.* at ¶ 7. That same day, Mr. Dolan telephoned Mr. Ota of Mori and Ota to tell him of the Commission's decision. *Id.* at ¶ 8. Mr. Ota said he had already learned of the Commission's decision from the Administrative Law Judge's clerk, but "indicated a continuing interest in retaining Pettit & Martin to represent Yamaha." *Id.* Later that evening, Mr. Dolan informed Mr. Ferguson of his discussion with Mr. Ota, and Mr. Dolan subsequently sent a copy of Mr. Ferguson's resume to Mori and Ota. *Id.*

Since November 16, 1979, Mr. Dolan has not spoken to anyone at Mori and Ota about this matter. *Id.* Mr. Dolan's subsequent discussions with Pettit & Martin personnel about this matter nave been limited to discussions to enable Pettit & Martin to evaluate the propriety of its participation in this matter. *Id.* at ¶¶ 9-14. Since he left the Commission, Mr. Dolan has had no discussion with anyone at either law firm about the pre-complaint investigation in *Brunswick,* the facts or theories involved in the litigation, trial tactics, or Commission procedures. *Id.* at ¶¶ 13-14; Ferguson Affidavit II ¶ 6; Mori Affidavit ¶ 3.

Based upon a telephone conversation between Mr. Ferguson and Mr. Ota on November 20, 1979, Pettit & Martin agreed to represent Yamaha in this proceeding. Ferguson Affidavit II ¶ 4. Yamaha retained Pettit & Martin with full knowledge that Mr. Dolan would not participate. Watanabe Affidavit ¶ 5. On November 21, 1979, Mr. Ferguson circulated a memorandum to all Washington, D.C. office personnel of Pettit & Martin[3] disclosing Pettit & Martin's repre-

[3] No employee of Pettit & Martin outside the Washington office is involved in the representation of Yamaha. Ferguson Affidavit II ¶ 5.

sentation of Yamaha and the fact that Mr. Dolan could not participate. This memorandum directed that: (i) no documents concerning this matter be shown to Mr. Dolan; (ii) no discussions concerning this matter include Mr. Dolan; and (iii) Mr. Dolan not communicate with representatives of Yamaha.

These procedures have been followed. Ferguson Affidavit I ¶ 6. Mr. Dolan will receive no added compensation from Pettit & Martin as a result of its representation of Yamaha, and if Mr. Dolan becomes a partner during the course of Pettit & Martin's representation of Yamaha, "a compensation formula will be devised so as to assure that Mr. Dolan does not share in the fees attributable to such representation." Ferguson Affidavit I ¶¶ 4-5.

II

We turn first to the broadest issue presented, whether general ethical standards require that the personal disqualification of Mr. Dolan be imputed to his law firm, under the reasoning of *Armstrong* v. *McAlpin*, 606 F.2d 28 (2d Cir. 1979) *reh. en banc granted* (No. 79-7042, Dec. 12, 1979), despite the procedures announced in Mr. Ferguson's memorandum of November 21, 1979. We hold that Pettit & Martin's enforcement of screening measures that effectively isolate Mr. Dolan from this proceeding permits the law firm to participate. We thus respectfully disagree with the reasoning in *Armstrong*.

The facts and the panel's holding in *Armstrong* may be summarized as follows: An attorney at the Securities and Exchange Commission left that agency to join a law firm. While at the SEC, he had been personally involved in an enforcement action against an individual. Later his law firm was engaged to bring a private action against that same individual. The former SEC attorney, who was con-

cededly disqualified from the matter, was screened from any participation in the firm's representation, in accordance with the procedures set forth in Formal Opinion 342 of the American Bar Association.[4] The district court, relying upon the efficacy of the screening, denied a motion to disqualify the firm.

A panel of the court of appeals for the Second Circuit reversed. Finding a risk that the conduct of government investigation and litigation may be influenced by future employment opportunities so long as the attorney has a direct, active, and personal involvement in such matters, the panel held that the attorney's disqualification alone was insufficient to forestall that harm, or its appearance. Rather, the individual's disqualification should be imputed to the attorney's firm as well. Screening procedures were deemed by the panel to be unsatisfactory because, in the panel's view, they do not create the appearance "to the

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[4] Opinion 342, issued on November 25, 1975, and appearing at 62 A.B.A.J. 517 (1976), clarifies and ameliorates the effects of Disciplinary Rules 5-101(D) and 9-101(B). DR 9-101(B) bars an individual lawyer from accepting employment "in a matter in which he had substantial responsibility while he was a public employee"; and DR 5-101(D) prohibits a law firm from accepting employment in a matter if any lawyer at the firm is disqualified from the matter. Opinion 342 states that the disqualified lawyer's firm need not be disqualified if it has adopted screening measures sufficient to "effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it," so long as these measures are satisfactory to the government agency concerned, and so long as "there is no appearance of significant impropriety affecting the interests of the government." The final proposal of the District of Columbia Bar, now pending before the D.C. Court of Appeals, likewise provides for a screening mechanism. Proposed DR 9-102(B)-(D); see 3 *District Lawyer* No. 5, at 56 (April/May 1979).

public, that there will be no possibility of financial reward" for shaping government action to enhance private employment. 606 F.2d at 34.

In so concluding, the panel focused on two factors: the possibility that the screened-out lawyer may nevertheless receive some sort of compensatory bonus or indirect share in the firm's earnings from the matter; and the belief that a firm's internal screening procedures are unlikely to be known "to casual observers" or to be persuasive to "the more informed." *Id.* Although the panel asserted that it was not attempting to formulate a general rule for imputed disqualification of a firm (*id.* at 33), it nevertheless declared that its decision did not turn on the particular facts, but on its rejection of the view that "the principle of using screening procedures to enforce DR 9-101(B) is applicable to this type of case. . . ." *Id.* at 34 n.7. Indeed, Movants would have us apply the rationale of the panel's decision in this proceeding. However, the Commission declines to accept this rationale, believing it to be incorrect in its underlying assumptions, and contrary to sound public policy.

The panel's rejection of screening procedures rests upon a chain of assumptions. Law firms adopting screening, the panel reasoned, may nevertheless provide some sort of compensation to screened attorneys attributable to the matter in which they are disqualified. Government attorneys, it was said, will be aware of this prospective benefit, and thus will continue to perceive an incentive that may influence their official actions even when they know they will be personally disqualified and screened.

The Department of Justice, in its brief *amicus curiae* on rehearing in *Armstrong*, has argued that these assumptions about lawyers' behavior were unsupported in the record of that case. We find them to be unsupported here.

Screening procedures must, under ABA Opinion 342, bar direct or indirect compensation to a disqualified attorney.[5] In view of this, the probability that government lawyers will nevertheless anticipate some post-employment reward for their official actions is so low as to be without significance. Moreover, our experience does not support the panel's apparent assumption that a significant number of private firms or government attorneys will seek to evade the strictures of Disciplinary Rule 9-101(B) and Opinion 342. As the Justice Department said in its *amicus* brief, at 43:

> "Government lawyers engaged in investigation and litigation know that their future employment prospects in private practice depend on other factors. These are chiefly their reputation for professional competence in their chosen specialty, their demonstrated vigor in exercising that competence solely in the public interest, and complete personal integrity. The possibility of either direct or indirect post-employment compensation for official action is thus too speculative and unsupported to outweigh the adverse impact that a total rejection [of] screening would have on the recruitment of government attorneys."

We do not share the panel's conclusion that the entire firm must be disqualified because of the "appearance" that internal screening procedures are inadequate. The standard for judging the appearance of impropriety is not governed by what "casual observers" might perceive, or by what may be unpersuasive to a skeptic. It is measured by the perception of a reasonable person. On-the-record public disclosure, as here, that a former government attorney has disqualified himself and has been screened from a firm's participation in a matter is amply sufficient to meet

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[5] The record before us shows that Mr. Dolan is barred from such compensation. Ferguson Affidavit I ¶¶ 4-5.

the test of reasonableness. Absent a showing of unethical conduct that would taint the underlying proceeding, ". . . appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Board of Education* v. *Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979). See also *Woods* v. *Covington County Bank*, 537 F.2d 904, 813 (5th Cir. 1976); *Kesselhaut* v. *United States*, 555 F.2d 791, 793 (Ct. Claims 1977).

The panel's holding is, in our view, inconsistent with the conflict-of-interest restrictions enacted by Congress in amending 18 U.S.C. §207. This statute specifically covers a former government employee's prior involvement, both directly and in a supervisory capacity. Congress declined, however, to extend the statute's restrictions, in either case, to the former government employee's current associates. In framing the scope of these restrictions, Congress explicitly considered their impact on important policy goals, such as the government's recruitment capabilities. S. Rep. No. 95-170, 95th Cong., 1st Sess. 32 (1977); H.R. Rep. No. 96-115, 96th Cong., 1st Sess. 3-6 (1979); 125 Cong. Rec. H3391-3403 (daily ed., May 16, 1979); *id.* at H3689-3698 (daily ed., May 24, 1979).

Finally, we note that our rejection of any general prophylactic ban on screening devices is consistent with other recent expressions on this subject. On December 14, 1979, the Administrative Conference of the United States adopted Recommendation 79-7, "Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency." This recommendation contains a section directly addressed to the *Armstrong* issue:

> "[T]he disqualification of a former employee to act in a matter ordinarily should not extend to his firm or organization. Instead, the former employee should be barred from both personal participation in the mat-

> ter and receiving compensation for anyone else's work done on it. An affidavit that the former employee is thus 'screened' should be submitted by a partner in the firm, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. A court should retain its authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, it should give special weight to the agency's view as to whether the 'screening' arrangement affords adequate protection to its interest." 45 Fed. Reg. 2310 (Jan. 11, 1980).

In addition, the Federal Legal Council, a forum of fifteen agency general counsels established by Executive Order, adopted a resolution declaring that: "[T]he public interest, the legal profession, and the various Federal legal offices are best served by scrupulous adherence to existing laws . . . and the existing ethical guidelines of the American Bar Association (particularly Formal Opinion 342 of the A.B.A.'s Committee on Professional Ethics, which sets forth an approved screening procedure to be applied in situations such as found in the *Armstrong* case) . . . ."

Such support for the use of screening mechanisms reflects not only a considered belief in their efficacy but also a proper regard for the detrimental consequences that the *Armstrong* principle would produce. The Commission believes that a general rule of imputed disqualification without the possibility of screening would seriously impair its ability to attract qualified attorneys to its service. As the Senate Committee on Government Operations observed when it endorsed the ABA screening mechanism:

> "We have no doubt that the proposed restrictions [*i.e.*, imputed disqualification without the possibility of screening] would have a detrimental effect on the government's ability to recruit able and experienced regu-

> lators from the legal community: those with established careers might not be interested in jeopardizing later practice by a stint in government, and those without established practices may view agency service as a limitation upon future career alternatives and options. For both reasons, the effectiveness of government could be adversely affected." Study on Federal Regulations, Vol. I, 95th Cong., 1st Sess. 87 (1977).

See also Resolution of the Federal Legal Council, *supra*, at 1-2 ("The [*Armstrong*] holding would have a serious adverse effect on the ability of Government legal offices to recruit and retain well-qualified attorneys.")

For these reasons, we decline to adopt the reasoning of the *Armstrong* panel decision in the regulation of practitioners who appear before this agency.[6] We hold that the firm of Pettit & Martin had adopted and enforced satisfactory screening procedures.[7] The firm is accordingly not automatically disqualified from participation in this matter because of the personal disqualification of Mr. Dolan.

III

We also conclude that neither law firm has violated the Commission's Rules of Practice, though as we discuss *infra*, the actions of Mr. Dolan and Pettit & Martin cause concern and prompt us to adopt, for the first time, an interpretation of our rule intended to prohibit active solici-

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[6] We similarly decline to adopt the result in *Price* v. *Admiral Insurance Co.*, No. 78-2812 (E.D. Pa. Sept. 28, 1979), which was based upon the particular circumstances of that case and which contains no discussion of Formal Opinion 342 and the policy considerations underlying it.

[7] Under the Commission's current practice, which is consistent with the Administrative Conference recommendation, specific advance approval of a screening mechanism need not be sought.

tation by a disqualified attorney which secures for his or her law firm new business from which the attorney is disqualified.

Movants contend that Mr. Dolan, Pettit & Martin, and Mori and Ota have violated Rule 4.1(b)(1). This rule prohibits former Commission employees from "appear[ing] as attorney or counsel or otherwise participat[ing] through any form of professional consultation or assistance in any proceeding or investigation, formal or informal, which was pending in any manner in the Commission while such former member or employee served with the Commission," unless the Commission authorizes such participation. Mr. Dolan has not obtained authorization to appear in this proceeding, nor could he, because he participated personally and substantially in the proceeding while at the Commission. See Rule 4.1(b)(3)(i). However, in accordance with the Rule, Mr. Dolan is not currently participating in Pettit & Martin's representation of Yamaha, and Pettit & Martin has established procedures to ensure that he will not do so.[8]

Thus, the issue raised by Movants is not Mr. Dolan's current participation in the proceeding, but that of Pettit & Martin and Mori and Ota. These firms are not literally disqualified by Rule 4.1(b)(1), the terms of which expressly apply only to the activities of former employees themselves. Movants argue, however, that the law firms have violated Rule 4.1(b)(4), which states that if a former em-

[8] We also conclude that even if Mr. Dolan's actions prior to November 21, 1979, contravened Rule 4.1(b)(1), we would reach the same determination set forth below with respect to disqualification of the firms.

ployee is disqualified from a matter, "his services shall not be utilized in any respect in such matter nor shall the matter be discussed with him in any manner by any partner or legal or business associate." Any violation of this Rule can only have occurred on or before November 16, 1979, because Mr. Dolan's only subsequent activity relating to this proceeding has involved resolution of the disqualification issue, activity that the Commission plainly did not intend to proscribe.

The primary objective of Rule 4.1(b)(4) is to require a law firm to adopt screening measures sufficient to prevent any discussion with the disqualified attorney that would aid the firm's participating attorneys in their legal representation. Pettit & Martin has done so, and the record is clear that Pettit & Martin has not utilized Mr. Dolan's services in their representation of Yamaha.[9]

The record also indicates, however, that it is unlikely that Pettit & Martin would have been retained by Yamaha had it not been for Mr. Dolan's actions. Indeed, we believe that, taken together, Mr. Dolan's course of conduct here constituted solicitation of the business in question. He "broached" to Mr. Mori the possibility of Pettit & Martin handling some of Mori and Ota's Washington legal business—though we note that this was a reference to legal business in general, and not to the particular matter from which Mr. Dolan was and is disqualified. When Mr. Mori responded that the only Washington antitrust business then being handled by his firm was the *Brunswick* matter and that Mr. Dolan could not participate in that matter

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[9] We note that Mori and Ota could not be viewed as "legal or business associates" of Mr. Dolan, as that phrase is used in Rule 4.1(b)(4), before they retained Pettit & Martin as co-counsel on November 20, 1979.

because of his prior involvement as a Commission employee, Mr. Dolan explained that Pettit & Martin could handle the matter so long as he personally was screened, and he went on to suggest a particular Pettit & Martin partner for the job and to describe the partner's qualifications. At the same meeting, Mr. Mori asked Mr. Dolan whether he knew if the Commission would soon issue its decision in *Brunswick*. Mr. Dolan replied that he did not know, but would inform Mr. Mori if he heard anything. A few days later Mr. Mori called Mr. Dolan to ask again whether he knew if the publication of the decision was imminent, and Mr. Dolan replied that "rumor had it that the Commission would soon reverse the Administrative Law Judge's Initial Decision, but that this rumor had surfaced in the past and [had] proven to be unfounded." Mr. Dolan then telephoned Mr. Ota shortly after the Commission's decision in Brunswick was issued, and subsequently sent a copy of the previously mentioned partner's resume to Mori and Ota.

Given the likelihood that Pettit & Martin obtained the business in question as a result of Mr. Dolan's activities, the question under Rule 4.1(b)(4) is whether Mr. Dolan's solicitation of Mori and Ota constituted "services" which Pettit & Martin "utilized in any respect" in the *Brunswick* matter. The quoted language is ambiguous. The most apparent meaning is that when an attorney is disqualified from participating in a matter, he may not aid his firm in any manner in its provision of legal representation in that matter. It is not clear whether the language also means that an attorney who is disqualified in a matter is prohibited from seeking to obtain that matter for his firm. The Commission has not previously construed the lan-

guage, and the "legislative history" of the rule provides no guidance.[10]

We decline to find, therefore, that Pettit & Martin violated Rule 4.1(b)(4)—as the rule would reasonably have been understood—when it obtained the *Brunswick* matter as a result of Mr. Dolan's solicitations on the firm's behalf. We do so because the vague language of the rule, together with the absence of any interpretation of it, fails to provide adequate notice that conduct of the kind under consideration here constitutes a violation. In addition, we note that our decision not to disqualify Pettit & Martin rests on a finding that Mr. Dolan's conduct has resulted in no actual impropriety. Mr. Dolan has provided no aid to Pettit & Martin in its representation of Yamaha in this proceeding. And Movants do not state, nor do we discern, how Mr. Dolan's conduct has itself affected the course of this proceeding in any way or how it has injured them. See *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Board of Education* v. *Nyguist, supra*, 590 F.2d at 1246. Moreover, there is no allegation that Mr. Dolan has received additional compensation for having brought

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[10] When Rule 4.1(b)(4) was originally adopted, it contained a procedure for Commission approval of law firm participation in a matter only after review of an affidavit showing no use by the law firm of the disqualified attorney's services in any respect in such matter and no fee-splitting, and only after a Commission finding that the firm's participation would entail no "actual or apparent impropriety." 32 Fed. Reg. 8456 (June 13, 1967). When the present language of the rule was adopted in 1975, the Federal Register notice simply stated that the revision "eliminate[d] the requirement for filing affidavits in a case in which a former Commission member or employee is prohibited from appearing or participating in a Commission proceeding or investigation, and his partner(s) or associate(s) desire to appear or participate therein without utilizing his services." 40 Fed. Reg. 15235 (April 4, 1975).

this business to his firm, or that he pursued his responsibilities at the Commission with anything less than the customary vigor of complaint counsel.

However, our conclusion here — that disqualification would be unfair given the ambiguous and previously uninterpreted language of Rule 4.1(b)(4)—should not be perceived as approval of Mr. Dolan's behavior and Pettit & Martin's acquiescence in it. To the contrary, serious ethical concerns arise from affirmative actions by a disqualified attorney designed to bring to his firm new business directly related to a matter from which the attorney is disqualified.

The appearance of impropriety in such a situation might manifest itself in two ways. An observer might suppose that the attorney had been unwarrantedly solicitous to a potential client while still with the government, to inspire gratitude or good feelings in that client and thereby pave the way toward bringing the client's business to the attorney's new firm. Or, the observer might surmise that if the client retained the disqualified attorney's new firm at the behest of the attorney, it would do so to obtain that attorney's services surreptitiously, notwithstanding supposed screening devices.

There is no countervailing policy reason in support of a law firm obtaining business from the active solicitation of an attorney who is disqualified from such business. We do not believe firms should expect that government lawyers will bring into the firm business from which the former government lawyer is personally disqualified. Similarly, our concern for the rights of clients to counsel of their choice is greatly diminished where they are led to retain a firm to represent them through the intercession of a former government attorney who is personally disqualified from representing them.

The Securities and Exchange Commission has adopted a specific rule dealing with this situation. 17 C.F.R. § 200. 735-8. At such time as we conclude our rulemaking on comprehensive revisions of Rule 4.1(b),[11] we will adopt a comparable rule. In the interim, we shall make the applicability of the current rule clear: If a private party asks a former Commission attorney to provide legal representation in a matter from which the attorney is disqualified, the disqualified attorney may state that he is disqualified and recommend another attorney, even an attorney in his or her own firm. In such a situation, the disqualified attorney is a mere passive recipient of an inquiry, and we see no ethical problem in referring the matter on to someone else. But henceforth, any firm which obtains a matter through the active solicitation of an attorney who is disqualified from that matter, will be considered to have utilized that attorney's services in the matter in violation of Rule 4.1 (b)(4).

For the foregoing reasons, IT IS ORDERED that the petition of respondents Brunswick Corporation and Mariner Corp. to disqualify the firms of Mori and Ota and Pettit & Martin is hereby denied.

By the Commission.

/s/ *Carol M. Thomas*
Carol M. Thomas
Secretary

ISSUED 22 FEB 1980

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[11] 43 Fed. Reg. 35947 (Aug. 14, 1978); 44 Fed. Reg. 45179 (Aug. 1, 1979).

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Michael Pertschuk, Chairman
Paul Rand Dixon
David A. Clanton
Robert Pitofsky

In the Matter of	)	
BRUNSWICK CORPORATION, a corporation;	)	
YAMAHA MOTOR CO., LTD., a corporation; and	)	DOCKET NO. 9028
MARINER CORP., a corporation.	)	

OPINION OF THE COMMISSION

By Pitofsky, Commissioner:

The complaint in this case charges respondents Brunswick Corporation ("Brunswick"), Yamaha Motor Company, Limited ("Yamaha") and Brunswick's wholly-owned subsidiary Mariner Corp. ("Mariner") with violating Section 7 of the Clayton Act, 15 U.S.C. Section 18, and Section 5 of the Federal Trade Commission Act. 15 U.S.C. Section 45, by a transaction involving a joint venture agreement. The complaint alleges that the effects of the joint venture may be substantially to lessen competition or to tend to create a monopoly in the manufacuring and/or marketing of outboard motors in the United States by, *inter alia*, eliminating substantial potential competition between Brunswick, Yamaha and Mariner, and increasing barriers to entry and concentration levels in the relevant market.

The Administrative Law Judge (ALJ) issued an order on May 2, 1977 dismissing the complaint. He determined that the addition of a "new entrant into the market" by this venture, combined with its enhancement of "Yamaha's potential as a future entrant," I.D. p. 88,[1] outweighed any anticompetitive effects the agreement may have had. The ALJ further rejected Complaint Counsel's contention that the agreement constituted an illegal division of world markets. I.D. p. 95.

For reasons discussed below, we disagree and find that this joint venture in several respects substantially lessened actual and potential competition. Specifically, the joint venture violated the antitrust laws in that it eliminated likely independent entry by Yamaha, eliminated actual existing competition provided by Yamaha in the United States market, and because a series of collateral agreements entered into in connection with the joint venture constituted an illegal limitation on competition between Yamaha and Brunswick. Measuring and balancing the pro-competitive and anti-competitive effects of a joint venture is often a very delicate task and this case is no exception. Nevertheless, we believe the anticompetitive effects are sufficiently pronounced here to require a finding of a violation.

I. *The Parties and the Industry Involved*

Brunswick is a diversified manufacturer and marketer of medical products and recreational items with a net in-

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[1] The following abbreviations are used herein:

I.D. — Initial Decision
Finding of Fact No.
I.D. p. — Initial Decision Page No.
Tr. — Transcript of Testimony, Page No.
CX — Complaint Counsel's Exhibit No.
BX — Respondents Exhibit No.
CAB — Complaint Counsel's Appeal Brief
RAB — Respondents Appeal Brief

come in 1973 of $39 million on net sales of $683 million. Brunswick commenced manufacturing marine engines in 1961 when it acquired what is now its Mercury Marine Division ("Mercury"). Mercury manufactures and sells outboard motors, stern drives and inboard marine engines and snowmobiles. In 1973, Mercury sold 130,000 units of outboard motors valued at $80 million. It is the second largest seller of outboard motors in the United States. Mercury also sells outboard motors in Canada, Australia, Europe and Japan.

Yamaha is a Japanese corporation. Nippon Gakki Co., Ltd., ("Nippon Gakki"), a Japanese corporation which manufactures musical instruments and sporting goods, incorporated Yamaha to manufacture motorcycles. Nippon Gakki owns 39.11% of Yamaha's stock; the next largest shareholder holds 5%. Since 1961, Yamaha has manufactured and sold snowmobiles, motorcycles and spare parts to Yamaha International Corporation a wholly-owned subsidiary of Nippon Gakki, which in turn distributes in the United States. In 1972, approximately 40 percent of Yamaha's total sales of $405 million were made for export to the United States.

Yamaha also manufactures outboard motors through Sanshin Kogyo Company Limited ("Sanshin"), a Japanese corporation. Yamaha acquired 60% of Sanshin's stock in 1969. Since then, Sanshin has produced all "Yamaha" brand outboard motors. In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha. Twenty-five thousand of these were exported, mostly in Europe, but some of these Sanshin outboard motors had been exported to the United States prior to the joint venture.

On November 21, 1972, Brunswick entered into a joint venture agreement with Yamaha. In contemplation of this agreement, Brunswick formed Mariner Corporation

("Mariner"), a wholly-owned subsidiary. Under the terms of the joint venture agreement, Brunswick caused Mariner to purchase 62,000 shares of Sanshin stock for approximately $1.4 million, resulting in Mariner and Yamaha each owning 38 percent of the total outstanding stock of Sanshin.[2] Five of Sanshin's 11 directors were to be appointed by Mariner, 6 by Yamaha. The motors manufactured by Sanshin were to be marketed in Japan by Yamaha under the "Yamaha" label, in North America and Australia by Mariner under the "Mariner" label, and on a non-exclusive basis by either parent in the rest of the world.[3] Yamaha and Mariner are the sole purchasers of the products which Sanshin manufactures.

The joint venture agreement also incorporates licensing arrangements providing for the exchange among Mercury, Yamaha and Sanshin of patent and technical information and a technical assistance agreement. Technical information other than patents and the like exchanged pursuant to the agreements becomes the joint property of the parties, while patents and other licenses are renewable, at reasonable cost. The joint venture agreement is to remain in effect for an initial period of 10 years with automatic extensions for 3 year periods (subject to any necessary Japanese government approvals) unless notice of termination is given by either party 3 years prior to the expiration of the initial or any extended term.

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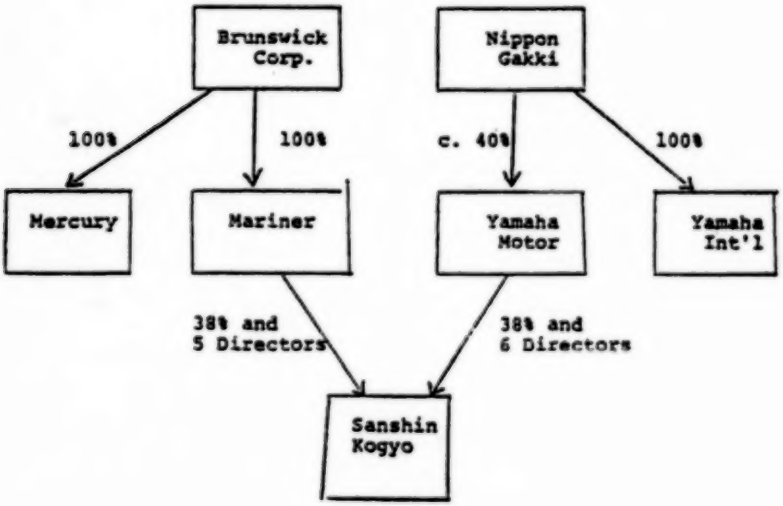
[2] The remaining 24 percent of the Sanshin stock is held by individual Japanese shareholders.

[3] In October 1973, the agreement was amended to provide that Yamaha could continue selling outboard motors to the Mexican government for their fishing program. Otherwise, Mariner's rights to sell Sanshin products in North America were exclusive.

The following is a diagram of the transactions:



The United States outboard motor industry, in both its low and high horsepower segments, is marked by the substantial dominance of a few firms. The four principal competitors in 1973—Outboard Marine Corporation ("OMC") (through its Johnson and Evinrude brands), Brunswick (through the Mercury brand), Chrysler, and Eska—accounted for 94.9% of the market by units sold with the top two firms controlling 72.9%. I.D. 78. Dollar volume figures are even more dramatic: the top four firms accounted for 98.6%, with the top two controlling 85.0%. I.D. 78. If the figures are broken out by low horsepower and high horsepower motors, similar results obtain. In the low end, by unit volume, the concentration ratios are 4:98.1% and 2:69.3%; by dollar volume, the figures are

4:94.4% and 2:73.6%.[4] I.D. 86. In the high horsepower end, figures are available only for the top three firms, since they control 100% both by dollar and by unit volume. The top two firms account for 88.8% both by units and dollars. I.D. 101.

"Historically, the outboard motor industry has been marked by a lack of significant entry and a declining number of firms," I.D. 77, quoting Yamaha Amended Ans., ¶19, even though it is an industry characterized by rapid sales growth and high profits. BX 12; CX 71D. While U.S. sales of outboard motors rose by 10.9% annually between 1963 and 1972, I.D. 64, imports in 1973 still made up an insignificant share. I.D. 67. Moreover, of the eight competitors in the U.S. industry in 1955, two had exited by 1969. Tr. 283-291, I.D. 77. Barriers to entry, including capital costs, technology and know-how, and the need to develop a sales network, have remained significant over time. I.D. 80, 81; Brunswick Amended Ans. ¶26, BX 12.

II. *Market Definition*

A. *Geographic Market*

The relevant geographic market is the United States, as stipulated by the parties. Complaint, ¶21; Brunswick Amended Ans., ¶21; Yamaha Amended Ans., ¶14.

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[4] Brunswick's Mercury Division is the number two firm in all computations except low horsepower motors by unit volume, where its sales are exceeded by those of Eska. Eska does not manufacture motors but assembles them from components it purchases. Tr. 609. Brunswick's number two position is firm, however, in both unit and dollar figures in the overall market and high horsepower end, and in dollar volume sales in the low horsepower end.

B. *Product Market*[5]

The boundaries of our analyses under Section 7 of the Clayton Act are determined by the familiar litany of factors the Supreme Court has enumerated in various cases. In *United States* v. *E. I duPont de Nemours & Co.*, 351 U.S. 377 (1956) (the *"Cellophane"* case), the Court set forth the outer reaches of a relevant market:

> "That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." 351 U.S. at 404.

The Supreme Court elaborated upon the appropriate test for market definition not long after *Cellophane* in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) where, after affirming that cross-elasticity of demand determines the "outer boundaries" of a product market,[6] the Court enumerated certain criteria which, when present, may point to the existence of submarkets, or significant market segments in which the competitive implications of a transaction may be demonstrated.

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[7]

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[5] The manufacture of electric outboard motors, inboard/outboard motors or stern drive motors have been excluded from the term "outboard motors" in this proceeding. (Stipulation, Tr. 169.)

[6] 370 U.S. at 325.

[7] 370 U.S. at 325.

The ALJ concluded that there was no overall outboard motor market, but rather that high and low horsepower outboard motors comprised two separate and distinct markets. I.D. 83, I.D. 99, and I.D. at 68. Complaint counsel contend that there is a broad overall outboard motor market, because outboard motor manufacturers constitute a recognized industry of firms selling outboard motors which are interchangeable within broad horsepower ranges. Complaint counsel further contend that despite the price differential between low and high horsepower outboards, there is commonality in their production, distribution, components, general technology, and basic end uses. CAB at 34-36. Complaint counsel took no position on the possibility of sub-market categories within the overall outboard motor market.

Respondents' position before the ALJ was that the relevant market consisted of sales of all outboard motors through marine dealers, excluding low price outboards marketed through mass merchandisers or by any other distribution system. Respondents apparently believe their position was essentially consistent with the ALJ's market determinations, RAB at 41, since high horsepower outboards have traditionally been sold exclusively through marine dealers and respondent regarded low horsepower motor sales as irrelevant to this case.

We think the ALJ's discussion of the factors which go into a market analysis should have led him to the conclusion that there is an overall outboard motor market. While it is not essential to disposition of this case, we further note that the record supports findings that the low horsepower and high horsepower segments are appropriate submarkets when examined in light of *Brown Shoe*.

The basic end use of all outboard motors is the same—to push a boat through water. It would be too simplistic, however, for us to conclude on that basis that ten 6-horsepower motors can reasonably be used in place of one 60-horsepower motor. But such a strict standard need not be met for an entire industry to constitute a product market, and we have recognized this in the past. *See British Oxygen Co.*, 86 F.T.C. 1241, rev'd. on other grounds *sub nom BOC International, Ltd.* v. *FTC*, 557 F.2d 24 (2d Cir., 1977) (industrial gases); *Coca-Cola Bottling Company of New York, Inc.*, FTC Docket 8992 (Jan. 23, 1979) (wine); *Liggett and Myers*, 87 F.T.C. 1074 (1976) (dog foods). Here, the three companies in the higher end of the market are all active and substantial competitors in the lower end of the market. But, more important, three characteristics convince us that an overall market exists: industry recognition, technological overlap along the entire horsepower range, and, most significant, the economic incentive sellers have to manufacture and market a full line of motors.

First, both the industry trade association, the Boating Industry Association, and its individual company members recognize the existence of a United States outboard motor industry. CX 91; CX 90; BX 25; BX 12. A market study performed for American Honda discusses and describes an overall outboard motor market, as does a securities research report prepared for OMC. Bx 12; CX 90.

Second, while a 200 h.p. motor is different in many ways from a 10 h.p. motor, there is considerable technological overlap throughout the line. All outboard motors are composed basically of an electrical system, a powerhead and a lower unit containing the gear train, propeller and fuel

supply. I.D. 62. Certain features requiring advanced technology appear on high horsepower motors and not on low horsepower motors, such as jet prop exhaust and capacitor discharge ignition ("CDI"). I.D. 105. CDI is not as necessary on smaller outboards, and would add substantially to their cost. I.D. 116. Similarly, jet prop exhaust is costly and has not been incorporated by one major competitor, Chrysler, into any of its engines. I.D. 112. But these features are minor in the context of the overall technology involved in outboard motor manufacture.

Third, as respondents vigorously contend, the ability to market a full line of motors is of economic benefit to outboard manufacturers. OMC and Mercury, which together accounted for 72.9% of all units sold in 1973, I.D. 78, both sell their motors exclusively through marine dealers. Chrysler sells its motors both through marine dealers and mass merchandisers like Sears and Motgomery Ward. Eska and Clinton, the other two competitors in the industry between 1971 and 1973, I.D. 77-79, sell their motors exclusively through mass merchandisers. I.D. 97. Well over 70% of total distribution of outboard motors is through sales to marine dealers. The dealers prefer a full line, usually sourced by a single brand, in order to offer the widest range of product choice to customers, I.D. 126, along with the boats, accessories, and skilled servicing they also provide. I.D. 124-5. So while the smallest outboards do not compete directly with the largest, there are economic reasons for viewing all motors as competing in one market.

In *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321 (1962), "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' " was

held to constitute a distinct line of commerce, despite the lack of price sensitivity or head-on competition among the various components of the "cluster." 374 U.S. at 356. Because of considerations of "convenience", and also some economic reasons why customers were likely to prefer doing their banking business in one place, the cluster of banking services was seen as constituting in practical terms a distinct product market category. See *U.S.* v. *Phillipsburg National Bank*, 399 U.S. 350, 360-61 (1969). The outboard motor market involves the "cluster" aspect of *Philadelphia National Bank* from a retailer's point of view. In contrast to the situation which obtains with regard to "commercial banking," no single consumer has an economic incentive to purchase a number of outboard motors under a single roof rather than shopping around. But dealers have strong incentives to display a broad line from a single supplier, Tr. 696, and, as a result manufacturers have strong incentives to be able to supply that full line.

Such incentives, which respondents emphasize as part of their own case, RAB 34-36, point to an overall outboard motor market, and do not establish respondents' asserted market: outboard motors sold through marine dealers. The record shows that low horsepower motors, however sold, compete with each other; there is considerable price sensitivity across distributional lines. I.D. 98. Eska, for example, distributing through mass merchandisers, was able to make substantial inroads on OMC's share of low horsepower outboard motor sales. I.D. 95.

Of course, the existence of an overall market does not bar scrutiny of the effects of this joint venture in appropriate submarkets. There are aspects of the outboard motor industry which distinguish low horsepower motors

from high horsepower motors.[8] In general, high horsepower motors are used on larger boats, for water skiing or cruising. I.D. 102, 103. Low horsepower motors are primarily used on smaller boats, for fishing, hunting and on sailboats[9] I.D. 89; CX 90-J, CX 90-Z; I.D. 90. Differences in production facilities between low and high horsepower motors seem generally to be attributable to the physical size of the motor to be manufactured. I.D. 92; Tr. 298-300, 393.

Mr. Strang of OMC, the largest competitor in both low and high horsepower outboards, testified that OMC's pricing decisions regarding high horsepower outboards are not affected by prices set for low horsepower outboards, and vice versa. Tr. 397. In pricing high horsepower motors, OMC looked only to the prices set by Chrysler and Mercury. Tr. 537. Advertising, however, was generally "of the whole line in some publications, and then specific advertising aimed at the use of a given size engine in other publications." Tr. 397-8.

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[8] While somewhat arbitrary, the ALJ determined the dividing line between "low" and "high" horsepower motors to be at 20 h.p. I.D. at 21, footnote 3., I.D. 83. We find this dividing line reasonable.

[9] There is, however, notable overlap in uses. As Mr. Dillon, General Manufacturing Manager of Chrysler's Marine Products group described it:

> "Generally . . . we deal with different classes or markets that we aim at with our product line, and generally we speak of the small twins [up to 15 h.p. motors] as catering to the fishing market, but I hasten to say that there is an excellent fishing market at 105 horsepower, so I don't think our terminology is necessarily very firm." Tr. 304.

It is certainly true that "industry activities cannot be confined to trim categories."[10] A degree of imprecision always attends the attempt to fit dynamic economic operations into neat pigeonholes. Therefore, we are inclined to agree with the ALJ that there are significant differences between low and high horsepower motors. However, we do not agree that such differences are of a degree that warrants the finding of two entirely separate markets. Therefore, we find that there is an overall outboard motor industry, with two submarkets: outboard motors of 20 h.p. and under, and outboard motors of over 20 h.p.[11]

III. *The Positions of Yamaha and Brunswick Vis-a-Vis the Market*

A. *Yamaha*

Outboard motors, like snowmobiles and motorcycles, have two-cycle engines. Yamaha entered the U.S. snowmobile market in 1968 and by 1974 was marketing eleven or twelve models. Stipulation No. 2, #32. Even more dramatic is the 20% share of the U.S. motorcycle market captured by Yamaha between 1959, the year it entered the U.S. market, and 1974. Stipulation No. 2, #25, #27, #28. "Yamaha" brand motorcycles are sold through a network of franchised retail dealers developed in the U.S. by YIC.[12]

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[10] *Cellophane*, 351 U.S. at 395.

[11] In light of our disposition of the relevant product market question, it is unnecessary to nicely distinguish between the overall outboard motor industry and its low and high horsepower segments because we find that both are market categories in which anticompetitive effects can occur and, as will be demonstrated below (see note 27 p. 19 and following text), Yamaha was a potential and actual participant in each of those markets.

[12] Some of those dealers also market "Yamaha" brand snowmobiles. I.D. 179.

I.D. 176. There is heavy advertising and substantial brand recognition in the United States for the "Yamaha" name. Stipulation No. 2, #24.

Yamaha has marketed outboard motors in Europe, Canada, South East Asia, Africa, the Middle East, Australia, and Central and South America. I.D. 173. Those motors were both water and air-cooled, with all component parts manufactured by Sanshin. I.D. 164. Yamaha was marketing motors of up to 25 h.p. in 1972, I.D. 175, with development plans in progress for higher horsepower engines.[13] Yamaha exhibited a prototype 55 h.p. motor at the 1972 Tokyo Boat Show with a jet prop exhaust system and marketed that motor in Japan in 1973. I.D. 170. Japanese ignition systems makers were able to provide a CDI system at that time. I.D. 117.[14] Thus there seems little doubt that the technology was available to Yamaha to produce and sell in the United States—as it was then selling in other foreign markets—outboard motors suitable to compete effectively in this market.

Yamaha had made two unsuccessful attempts to enter the U.S. outboard motor market prior to the joint venture agreement. In 1968, Yamaha attempted to market air-cooled, single-cycle outboards ranging from 3.5 to 7.5 h.p. through its motorcycle dealers. Only about 900 motors were delivered to dealers. The Yamaha motors suffered a price disadvantage in certain parts of the U.S. due to

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[13] In 1970, a 40 h.p. motor was in planning at Yamaha for "the export sector." CX 26-D.

[14] Many companies, including Japanese producers, offered CDI systems for sale in 1972. I.D. 115. Jet prop exhaust technology has been available from a long expired 1921 patent. I.D. 112. Even when the patent was in effect, it did not prevent the development of such systems, or "inventing around" the patent, by other producers. Tr. 401-405.

freight costs, and were air-cooled single engines, while the U.S. preference was for water-cooled two-cylinder engines. CX 61, CX 68; I.D. 153-155. In 1971-72, Yamaha sold about 500 1.5 h.p. motors to Sears for marketing under the "Sears" brand. The Yamaha motors did not sell well at Sears because the quality and the price were too high for Sears' market. I.D. 156, 157.

As noted, the U.S. market for outboard motors was the world's largest and was expanding. Yamaha's plans in 1971 called for the export of a two cycle 6 h.p. motor, featuring water-cooling, noise and water pollution controls, and CDI. The engine was scheduled for production in early 1973 as "the major model" for export into the U.S. CX 20-D; I.D. 161. Similar plans for motors to be exported into the U.S. were developed during 1971 for 10 h.p., 9.5 h.p., and 45 h.p. models. I.D. 162, 163.

B. *Brunswick*

Brunswick, through its Mercury division, is the second largest seller of U.S. outboard motors accounting annually during the period 1971-73 for 20-22% of units sold. I.D. 78. Since at least 1971, Mercury has sold outboards in Europe, Canada, Australia and Japan as well as in the U.S. I.D. 5; CX 91-A-I; CX 101-A-C. In the U.S., Mercury's market share had remained relatively stable since 1965. I.D. 78, 128. Prior to entering the joint venture, Mercury decided to pursue production of a second line of outboards as a means of increasing its share. A second line would allow Mercury to enlist additional marine dealers in close proximity to those carrying the "Mercury" brand, thus expanding its dealer network, and, at the same time, explore marketing through other retail outlets. I.D. 129, 130; Brunswick Admissions No. 6, p. 6. "Mariner" brand engines were to become that second line. Brunswick Admissions, No. 5, p. 5.

Brunswick also hoped to use its second line as a means of forestalling perceived new entry:

> From both a "defensive" and "offensive" viewpoint, it is obvious that we (Mercury) need new, simple, low cost, low horsepower offerings. So, too, do all of the other U.S. marine manufacturers. Everyone is vulnerable . . . It is not unlike the automotive industry and the price which they paid to foreign firms for abandoning the low price, compact market. We can expect a similar challenge—with or without us. Add to this the global opportunities for low horsepower engines resulting from less availability and higher cost for fuel, as well as different usage of the product. CX 8-A.

C. *The Joint Venture Agreement*

A joint venture agreement was entered into to further the mutual aim of the Mercury Division of Brunswick and Yamaha to manufacture and sell a new line of outboards. CX 1-A, 1-B. The implementing device was capital participation by Brunswick in Sanshin, Yamaha's manufacturing subsidiary, through a subsidiary created for that purpose—Mariner. Yamaha and Mariner were each to hold 62,000 shares of Sanshin stock.

Sanshin's Board was to be composed of eleven directors: 6 approved by Yamaha (including the President), and 5 by Mariner. Certain transactions, like approval of Sanshin's budgets and expansion or discontinuance of Sanshin's product line, required approval by seven directors. The Operating Committee, appointed by the Board, was to be composed of two Yamaha-appointed and two Mariner-appointed directors.

The original Article 8 of the agreement provided for the formation of a joint sales company, with the sales company, Mariner and Yamaha to buy all of Sanshin's

output.[15] It further provided that "Yamaha shall have the exclusive right to sell in Japan the product of Sanshin; and [Mariner] International shall have the exclusive right to sell in North America and Australia the products of Sanshin." CX 1-K. The joint sales company was to be the exclusive marketer of Sanshin products in the rest of the world. This article was amended in October, 1973, to eliminate the joint sales company, and to add New Zealand to Mariner's exclusive territories. As a result, Mariner brand, Mercury brand and Yamaha brand motors could all be marketed outside the designated exclusive territories by Yamaha and Mariner.[16] Under the terms of the agreement, Yamaha remained free to continue its practice of purchasing various motors for resale in Japan, but it was barred from manufacturing "directly or indirectly" the same motors or those "substantially the same" as the motors "which are or will be manufactured by Sanshin." CX 1-M.

The agreement was to extend for one initial ten-year period with automatic three-year extensions unless notice was given of intention to terminate three years before the expiration of the original or any extended term. CX 1-R.

The joint venture agreement contained ancillary agreements between Mercury and Sanshin, between Yamaha and Sanshin, and between Yamaha and Mercury, regard-

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[15] Sanshin was to charge its three buyers "identical prices" Article 8.__, CX 1-K.

[16] However, Mariner had already agreed, in response to a Yamaha inquiry, that it "would not seek out Yamaha's dealers in the non-exclusive markets" and that "our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers." I.D. at 94; CX 77-C.

ing technical assistance. CX 1-Z-5-46. Under these agreements, Mercury and Yamaha granted non-exclusive, non-assignable licenses to each other and to Sanshin to use "Technical Information", defined to include patents, designs, technical knowledge, data, manuals, experience and the like, in the manufacture of motors in accordance with the joint venture agreement.[17] Such licenses were limited however in that each company could not use the information to "make, use or sell 'goods' which are competitive to the goods manufactured" by the other company.[18] CX 1-Z-30.

IV. *Commerce Requirement*

Insofar as the conclusions reached in this opinion as to the legality of the Brunswick-Yamaha joint venture are grounded in Section 5 of the FTC Act there is no dispute that the jurisdictional "commerce" requirements of that statute are satisfied. Both respondents are admittedly engaged in commerce. I.D. 6, 24.

To the extent that Section 7 of the Clayton Act is the operative statute, this issue becomes somewhat more com-

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[17] Like the joint venture agreement, this agreement was to remain in effect for ten years, with automatic three year renewals. *See, e.g.*, Article 11.1, CX 1-Z-13.

[18] Indeed, Mercury's promises go even further. Article 6.7 provides:

> Because of the difficulty of identifying when a product of Mercury incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of execution of this agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles. CX 1-Z-39.

plex. Section 7 states, in pertinent part, "[n]o corporation engaged in commerce shall acquire . . . the stock . . . of another corporation engaged also in commerce." The sole acquisition involved in the transactions at issue is that by Brunswick (via Mariner) of the stock of Sanshin, the joint venture vehicle. For Section 7 to apply here, Sanshin as well as Brunswick must be "engaged in commerce."

The ALJ initially found that Sanshin "has never by itself engaged in commerce, within the meaning of the statute." (I.D. at 61) He reasoned, nevertheless, that Sanshin, because it was dominated by Yamaha and Brunswick (both engaged in commerce) prior to and after the formation of the joint venture, was engaged in commerce sufficient to meet the requirements of the statute.

We agree with the ALJ's conclusion that the commerce requirements of Section 7 are satisfied. We do so, however, for slightly different reasons. Based upon the ALJ's findings of fact, we conclude that Sanshin was itself "engaged in commerce" within the meaning of Section 7 of the Clayton Act without resort to any theory of vicarious participation through Yamaha and Brunswick.

"Commerce" for the purposes of the Clayton Act includes the foreign commerce of the United States.[19] A foreign corporation, by virtue of its exporting, or selling for import, its products to the United States, may be engaged in that foreign commerce.[20] A substantial portion of the outboard motors manufactured by Sanshin in Japan

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[19] Section 1 of the Clayton Act provides: "'Commerce,' as used herein, means trade or commerce among the several States *and with foreign nations*" (emphasis supplied). *See generally* W. Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973) 334.

[20] *See, e.g., United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966). *See also* W. Fugate, *supra*.

are sold to Mariner for import to the United States where they are distributed under the Mariner label. Were there no more to this arrangement than the transactions described above, the question of Sanshin's involvement in the foreign commerce of the United States would be a closer one. Certainly not every foreign corporation whose products are actually sold in this country through intermediaries is engaged in U.S. foreign commerce. This simple case is not, however, the one presented us by the Mariner-Sanshin arrangement.

We are not required to blind ourselves to the reality of the relationships between Mariner, Sanshin, Yamaha and Brunswick. Sanshin is not any Japanese corporation to whom Mariner has come as any purchaser. Sanshin exists for the purpose, made express in the joint venture agreement, of manufacturing motors for Mariner and Yamaha. Sanshin has no other customers for its motors. Sanshin's owners (Mariner and Yamaha), and perforce its management, knew and intended that a large part of Sanshin's production would be sold in the United States and such was in fact the case. There is evidence as well that Sanshin's product was designed and engineered with the American market in mind.

We do not challenge the reality of the separate corporate identities of Sanshin and Mariner or of the sales between them. But the interposition of a separate corporate entity as distribution arm and the formality of passage of title do not alter (though they may obscure) the fact that Sanshin's operations were intended to be and were, in fact, part of the flow of foreign commerce to the United States.[21]

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[21] *See U.S.* v. *Aluminum Co. of America*, 148 F.2d 416, 443-4 (2d Cir. 1945); *see also Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 608-14 (9th Cir., 1977); *Deutsche Lufthansa Aktiengesellschaft* v. *C.A.B.*, 479 F.2d 912, 917 n.9 (D.C. Cir. 1973); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968).

V. *The Legal Standard*

The joint venture is in some respects a "quasi-merger," where cooperation between formerly independent companies often acts to benefit and spur competition. The combined capital, assets, or know-how of two companies may facilitate entry into new markets and thereby enhance competition, or may create efficiencies or new productive capacity unachievable by either alone. As a result, relatively lenient merger standards usually apply to joint ventures,[22] rather than straight *per se* rules that may apply to cartel behavior.

But "[t]he talisman of 'joint venture' cannot save an agreement otherwise inherently illegal."[23] A price-fixing scheme or other cartel-like behavior cannot be insulated from review simply by fixing the "joint venture" label to a device used to engage in behavior inherently pernicious to competition. Thus, a threshhold question is whether a transaction can properly be characterized a "joint venture."

While the issue is a close one, we believe the Brunswick-Yamaha agreement is indeed a joint venture. There are factors which could point to a contrary answer. Sanshin already existed before the reallocation of its stock so no new productive capacity was created. Both joint venturers produced outboard motors, and between them, marketed all over the world before the venture was formed so the venture was not necessary to create a new competitor in otherwise unserved markets. However, each par-

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[22] *See U.S.* v. *Penn-Olin*, 378 U.S. 158, 170-2 (1964).

[23] *Engine Specialties, Inc.* v. *Bombardier Ltd.*, ---- F.2d ----, slip op. at 20 (1st Cir., July 25, 1979). *But see U.S.* v. *Minnesota Mining & Mfrg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

ent corporation made substantial contributions to the venture essentially capital and some important technology from Brunswick and technology plus an existing manufacturing facility from Yamaha. A new product emerged combining these respective technologies which was designed especially to compete in the U.S. market. This combination of assets and the new product generated seems adequate to dispel any claim that the agreement was a "naked agreement" between the parties designed solely to eliminate existing or potential competition. *See* Bork, The Rule of Reason and the *Per Se* Concept: Price Fixing and Market Division, 75 Yale L.J. 373, 462-4 (1966); *cf. U.S.* v. *Topco Associates,* 405 U.S. 596 (1972).

Therefore, we approach this transaction with the kind of analysis usually applied to mergers under Section 7 of the Clayton Act.[24] The test is the effect of the joint venture on actual or potential competition in the joint venture market. Here, there are three possible theories according to which the Brunswick-Yamaha joint venture might have lessened competition: (1) as a result of the joint venture, Yamaha may have been eliminated as an actual potential entrant into the United States market, *see FTC* v. *Procter and Gamble Co.,* 386 U.S. 568 (1967); *Kennecott Copper Corp.* v. *FTC,* 467 F.2d 67 (10th Cir. 1972), cert. *denied,* 416 U.S. 809 (1974); (2) the joint venture may have substantially reduced existing competi-

[24] "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by Congress to preserve and promote a free competitive economy." *U.S.* v. *Penn-Olin, supra,* 378 U.S. at 170. *See also U.S.* v. *Columbia Pictures Corp.,* 189 F. Supp. 153, 178-9 (S.D.N.Y. 1960); *but see U.S.* v. *Minnesota Mining & Mfg. Co.,* 92 F. Supp. 947 (D. Mass. 1950).

tion between Yamaha, Mercury, and others in the United States market, *see U.S.* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); and (3) collateral agreements between Brunswick and Yamaha, purportedly ancillary to the joint venture, may have constituted an illegal limitation on competition between the two parent firms. Our review of the record leads us to believe that all three anticompetitive effects are present here.

Complaint counsel also argued that Section 7 was violated by the removal of Yamaha's "in-the-wings" effect on the U.S. outboard motor market. In our view, it is not necessary to address that theory here, in light of our discussion of *U.S.* v. *El Paso Natural Gas Co.*, *supra*, pp. 24-5, *infra*. *El Paso* involves the elimination of actual competition from the market, and involves anticompetitive effects which are similar to but less ambiguous than those addressed by the perceived potential competition theory.

A. *Elimination of Yamaha as a Potential Entrant into the U.S. Outboard Motor Market*

Our starting point is that Brunswick, through Mercury, already was a vigorous competitor in the U.S. market, selling a product that competitive with the planned product of the joint venture. If the effect of the Brunswick-Yamaha joint venture, operating as it does in the identical product and geographic markets as Brunswick, was to eliminate Yamaha as a most likely potential entrant into the U.S. outboard motor market, that could constitute a substantial lessening of competition under Section 7.[25]

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[25] In this respect, the case is significantly different from *United States* v. *Penn-Olin Co.*, *supra*. There, the Court found that if either parent had entered the target market, that would have led the other parent of the joint venture to remain on the sidelines. If there was any lessening of competition in that situation, it neces-

(footnote continued)

In that event, there would be no introduction of effective new competition into the U.S. market. It is on this key point that we part company with the reasoning of the

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(footnote continued)

sarily would have been the loss of a sidelines procompetitive effect whereby the threat of entry by the second parent, eliminated by its participation in the joint venture, could have been a significant factor in affecting competitive decisions by existing sellers in the market. 378 U.S. at 173-4. By contrast, the theory to be explored here is that but for the joint venture, Brunswick would have continued to compete effectively on outboard motor sales in the U.S. market and Yamaha would have entered the market as a separate independent competitor. Arguably, that possibility was lost when Yamaha joined Brunswick in a joint venture. *Cf. U.S.* v. *Marine Bancorporation*, 418 U.S. 602 (1974); *U.S.* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *FTC* v. *Procter and Gamble Co.*, 386 U.S. 568 (1967).

While the Supreme Court expressly reserved decision on the validity of the actual potential competition doctrine, *U.S.* v. *Marine Bancorporation, supra*, 418 U.S. at 625, 639; *U.S.* v. *Falstaff Brewing, supra*, 410 U.S. at 537; *see also FTC* v. *Procter and Gamble, supra*, 386 U.S. at 575 ("If Procter had actually entered Clorox's dominant position would have been eroded and the concentration of the industry reduced"); the Commission, together with numerous federal courts, has endorsed the doctrine and we are confident that it eventually will receive the Supreme Court's approval. *See, e.g., U.S.* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1232 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974); *U.S.* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 147 (N.D. Cal.), *aff'd without opinion*, 385 U.S. 37 (1966); *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 77-78 n.8 (10th Cir. 1972), *cert. denied*, 416 U.S. 809 (1974); *Ecko Products Co.* v. *FTC*, 347 F.2d 745, 752-53 (7th Cir. 1965); *U.S.* v. *Wilson Sporting Goods Co.*, 288 F. Supp. 543, 560 (N.D. Ill. 1968); *U.S.* v. *Standard Oil Co. (New Jersey)*, 253 F. Supp. 196, 227 (D.N.J. 1966). The validity of the doctrine is also supported by eminent legal scholars. *See, e.g.*, Brodley, Potential Competition Mergers: A Structural Synthesis, 87 Yale L.J. 1, 45-52 (1977); Sullivan, *Handbook of the Law of Antitrust*, 651-2 (1977).

ALJ. Mercury was already competing in the U.S. and, as we will discuss below, it could not be expected that Mariner would compete vigorously with its own parent. Yet Yamaha, by joining in the joint venture, would as a practical matter no longer have any incentive to compete independently in the U.S. market.

Unlike *Penn-Olin*, a conclusion that the joint venture (operating through the Mariner brand) would not compete vigorously with Brunswick (operating through the Mercury brand)—at least not as vigorously as Yamaha would if it had entered as an independent competitor—can be reached as a matter of evidence rather than speculation.[26] Under the joint venture agreement, Brunswick had the right to appoint five of Sanshin's 11 directors and therefore obviously would have a significant say in Sanshin's decisions concerning price and output. Indeed, some key decisions required a Board majority of seven, and Brunswick in those matters would have an absolute veto. While Mariner was set up to market Sanshin output in the U.S. and Mercury was to remain separately incorporated and sell the Mercury brand, the same individual (Reichert) served as Chairman of Mariner and President of Mercury. I.D. 130, 131. It was understood motors were not to be sold to existing Mercury dealers, CX 7-D; CX 8-C; and Mariner engines were designed to appeal to and were sold to the extent possible to "a different type or class of customer," CX 7-C. In short, the entire transaction was organized to minimize, to the extent possible, competition for dealers and customers between Mercury and Mariner, an arrangement which would not have pertained if Yamaha had en-

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[26] In *Penn-Olin* the Court noted: "If the parent companies are in competition, or might compete absent the joint venture, it may be *assumed* that neither will compete with the progeny in its line of commerce." (emphasis added) 378 U.S. at 169.

tered the U.S. Market independently. Thus the tradeoff of an independent Yamaha for a dependent and controlled Mariner would clearly constitute a possible lessening of competition—roughly equivalent to the acquisition by Brunswick, a 20 to 22% factor in a very highly concentrated market,[27] of a small but potentially vigorous new competitor.

Although Yamaha's sales in the U.S. during 1971-2 accounted for less than 1% of the relevant market, we do not think that sales figures accurately reflect the degree to which Yamaha would be a factor in that market. Given its financial resources, technological abilities, brand name recognition in the U.S. and quality of product, we believe actual sales in the year or two before entry seriously understate its competitive potential—if it can be demonstrated that it would have entered independently. *Cf. U.S.* v. *Aluminum Co. of America*, 377 U.S. 271 (1964); *Stanley Works* v. *FTC*, 469 F.2d 478 (2d Cir. 1972).

We turn next to the question whether Yamaha was a likely candidate to enter the U.S. outboard motor market, and the high or low horsepower submarkets, absent the joint venture. To establish that Yamaha was an actual potential entrant into the U.S., complaint counsel would have to show that Yamaha had the capacity, interest, and

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[27] We are assuming in this discussion that the market in which Yamaha would have competed is the overall outboard motor market and there the top four companies accounted for 94.9% of units sold and 98.6% of dollar volume (*supra*, page 4). If we were to view Yamaha as a potential entrant only into the low horsepower submarket, the top four companies would account for 98.1% of units sold and 94.8% of dollar volume. See *supra*, page 4. Either way these concentration figures are extremely high and create a presumption that the addition of a new competitor would lead to significant deconcentration. *U.S.* v. *Marine Bancorporation*, *supra*, 418 U.S. at 631.

economic incentive to enter on its own. To establish a violation of §7, complaint counsel would also have to show that the target market was substantially concentrated and that independent entry offered a substantial likelihood of ultimately producing deconcentration or other significant pro-competitive effects. *U.S.* v. *Marine Bancorporation, supra; U.S.* v. *Falstaff Brewing, supra.* There is also authority that the Government must show that entry was likely to occur in the reasonably near future. *See BOC International, Ltd.* v. *FTC*, 557 F.2d 24, 29 (2d Cir. 1977).

The record is unusually clear in this case showing that Yamaha would have entered the U.S. outboard market and also its two submarket components if the joint venture had been unavailable to it. The agreement with Brunswick was, to Yamaha, an alternative to direct entry. CX 79-E. The U.S. market is the world's largest and most sophisticated for outboard motors. It was the only developed market in the world in which Yamaha was not selling "Yamaha" outboards before the commencement of the venture and was practically the only significant part of the world in which Yamaha was not selling substantial numbers of outboards at all. I.D. 173.

Yamaha's participation in the joint venture is itself some proof of Yamaha's interest in the U.S. market, and its economic self-interest and the profit potential of this market made continued efforts to enter highly likely. An additional proof of interest is the fact that Yamaha attempted to enter the U.S. market on two separate occasions.[28] Most important, Yamaha had concrete plans to enter the market by 1973, abandoned only when the joint venture alternative arose. I.D. 159-163.

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[28] *See* discussion pp. 11, *supra.*

While capacity to achieve independent entry successfully is always somewhat speculative, the record here is again unusually clear that Yamaha had what it would take to sell outboard motors in the United States. There were no technological or other reasons why Yamaha could not have successfully carried out its entry plans. Yamaha was engaged, at the time it entered the joint venture, in a vigorous product development program, aimed at the kind of high horsepower motors for which the U.S. is the prime market. In 1969, Yamaha planned to have a 25 h.p. motor for sale in the U.S. by 1971. CX 24-D. It planned for export a 40 h.p. engine to go into production in October, 1971, I.D. 160, and in 1971 planned a line of motors from 2 to 45 h.p.—*i.e.*, covering substantially the full range of high and low horsepower units—for production in 1972 for export to Europe and contemplated future export to the U.S. I.D. 163.

Yamaha exhibited a 25 h.p. motor it was marketing at the time and a prototype 55 h.p. motor at the 1972 and 1973 Tokyo Boat Shows. I.D. 166, 170. OMC, Brunswick's principal competitor, after it performed its own engineering evaluations, was so impressed with the performance of Yamaha's 25 h.p. motor that it took steps to upgrade the quality of its own 25 h.p. motor. I.D. 204.

Yamaha's management was experienced in producing and marketing outboard motors. Moreover, it was adept at marketing in remote areas. Not only were its outboards marketed virtually worldwide, but Yamaha's history of sales successes far from Japan, including the sale of motorcycles and snowmobiles in the United States, show the feasibility of Yamaha selling, servicing, and establishing dealership systems for its motorized products in the U.S. While it is true that imports of outboard motors had not been a major market factor prior to 1972, we believe this record establishes that Yamaha was ready and able to commit itself to a full scale entry.

Respondent argues that in 1972 Yamaha could not have entered the U.S. market because it needed a "more complete line" to attract necessary dealers. RAB 36. There is considerable evidence in the record, however, that Yamaha was producing a broad enough range of motors to enter the U.S. market by Mercury's, OMC's, and Yamaha's own estimations.

Thus, in 1972, Yamaha produced and sold "Yamaha" engines up to 25 h.p. The 55 h.p. model exhibited by Yamaha in prototype in Tokyo in 1972 was being manufactured and marketed in Japan in 1973. I.D. 170. OMC tested this engine in 1974 and found it a "very good performer." Tr. 448. In 1974, Mercury's Vice-President for Marketing defined a "full-line producer" as one "who is offering a reasonable spread—I don't think he would have to have every model—a reasonable spread from 3 or 4 horsepower to 40 or 50 horsepower." Answer of Brunswick to Complaint Counsel's Initial Request, pp. 18-19.[29]

Yamaha was in substantial agreement with that assessment. Mr. Eguchi, a Managing Director of Yamaha and a member of Sanshin's Board of Directors testified that "from our opinion, with the addition of the 55 horsepower, that is about the time we can go into a developed market like the United States or Canada." Tr. 699. OMC agreed, and in its 1972 studies of the likely impact of foreign entry on U.S. market shares, assumed that entry would occur with a line up to and through 50 h.p. Tr. 446. Yamaha had such a line in place in prototype in 1972, and on the market in 1973.

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[29] When Mariner began selling the U.S., it included an 85 h.p. Mercury motor, not part of the joint venture output but it had not been anticipated before or after entry that this motor was essential to entry. CX 8-D.

Respondents' "full-line" contention relates to its argument that "Yamaha had to develop a marine dealer network to enter the relevant United States market as a first-class competitor." RAB 23. We have already determined that the relevant market in this case is not just high horsepower alone, as the ALJ found,[30] but is all outboards as well as submarkets of high and low horsepower engines. Even in the high horsepower submarket, though, insofar as the record sheds any light on what constitutes a "full line", Yamaha had it. In addition, as we discuss below, there were various other ways for Yamaha to compete in the United States short of establishing a wholly new outboard motor distribution system. But if that *were* necessary, there is every reason to believe Yamaha could have done it.

As noted, though it is clear that Yamaha was a likely entrant, the potential competition doctrine has meaning only as applied to concentrated markets. "[T]here would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive."[31] The outboard motor market in the U.S. would benefit from aggressive new entry. Two firms control 85.0% of the overall market. The concentration ratios for both the high and low horsepower submarkets are also extremely high: 2:88.8% in the former, and 2:73.6% in the latter. Demand had been increasing, barriers to entry are significant, and profits are high. The number of firms in the high horsepower end of the market has declined over time, and while there has been some entry in the low end, it has been insignificant to the market leaders whose shares have remained constant. I.D. 87. Competition in the high

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[30] *See* discussion, pp. 6, *supra*.

[31] *U.S.* v. *Marine Bancorporation*, 418 U.S. at 630-1.

horsepower end is primarily based on technical innovation. I.D. 105.[32] Overall, competition in the outboard motor industry in the U.S., including both low and high horsepower submarkets, would be invigorated with the entry of a strong new seller.

Deconcentration was all the more feasible because Yamaha could have entered the U.S. market in a variety of ways absent the joint venture. The record evidence shows Yamaha could have entered *de novo,* sourcing its own line of motors from the Sanshin plant, through its U.S. sales company. Its motorcycle and snowmobile dealers could have provided sales outlets and servicing.[33] Alternatively, Yamaha could have again gone to mass merchandisers, with its own brand or a private label. Marine dealers are almost universally on one-year contracts and could, of course, be wrested from competitors by an aggressive entrant, or convinced to carry a second line. Other merchandisers, including camping and sports supply stores, were potential distributors, already under consideration as sales outlets by U.S. outboard manufacturers. I.D. 130. By 1972, Yamaha was producing motors for sale of up to 25 h.p., enabling it *at that moment* to enter the U.S. at least through the low horsepower end of the market[34] where

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[32] While the ALJ found the potential competition doctrine to be inapplicable to low horsepower outboard motor sales, we do not find the record evidence to support his statement that there is "intense price competition" in that segment, I.D. at 80, based as it was largely on the fact of sales of low horsepower engines by mass merchandisers and through private labelling as well as through marine dealers.

[33] The ultimate viability of an outboard motor distribution system composed of motorcycle dealers is not clear, but it was an option Yamaha had available to it, and actively considered. I.D. 172, 180, 181 *but see* I.D. 188.

[34] By 1972, Yamaha, with 12%, was second only to OMC in the European market. I.D. 184.

substantial growth was occurring and substantial profits were available. CX 8-B. Thus deconcentration was feasible and could occur in the near future.[35]

Independent entry by Yamaha would certainly have had a significant procompetitive impact on this market. Yamaha's financial strength overall, and its brand familiarity to U.S. consumers would have made its motors immediately acceptable. Yamaha intended to be "one of the top class outboard manufacturers" in the U.S. (Eguchi, Tr. 696). To do so, Yamaha would have to take on the market leaders "head-on," and compete fiercely to win market share.

Thus, the structure of the relevant market in this case is of the kind the Supreme Court described as being able to benefit from the effects of potential competition. *U.S.* v. *Marine Bancorporation, supra.* Moreover, given Yamaha's expansion history, strength in a variety of world and U.S. markets, development of an advanced motor that an existing U.S. competitor regarded as a market threat, with overall technological and financial capabilities, and stated entry plans regarding the U.S. outboard motor market, we think the "essential preconditions"[36] set out in *Marine Bancorporation* are fully met, and that Yamaha was an actual potential entrant into the U.S. Given these factors,

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[35] *Cf. BOC International, Ltd.* v. *FTC, supra.*

[36] *U.S.* v. *Marine Bancorporation, supra,* 418 U.S. at 633:
"Two essential preconditions must exist before it is possible to resolve whether the Government's theory, if proved, establishes a violation of §7. It must be determined: (i) that in fact NBC has available feasible means for entering the Spokane market other than by acquiring WTB; and (ii) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."

plus the absence of evidence that other potential entrants were poised at the edge of the market, we agree with the ALJ's finding below, that Yamaha was the most likely potential entrant. I.D. at 84.

B. *The Elimination of Yamaha's Present Procompetitive Effect: El Paso Natural Gas Co.*

We think the Brunswick-Yamaha joint venture also cannot withstand antitrust scrutiny on the theory of *U.S.* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). El Paso Natural Gas, with a preacquisition market share exceeding 50%, acquired Pacific Northwest, described by the court as "the only other important interstate pipeline west of the Rocky Mountains." Pacific Northwest was not only on the verge of entering the California natural gas market, but it had gone further and entered into negotiations and reached a tentative agreement for a supply contract with the largest industrial user of natural gas in Southern California. El Paso defeated that potential inroad by cutting its price and thereafter by acquiring Pacific Northwest. In *Marine Bancorporation*, the Supreme Court described El Paso as an "actual competition rather than a potential competition case," presumably because, as the Court wrote in *El Paso*, Pacific Northwest was "a substantial factor in the California market at the time it was acquired by El Paso."

Yamaha's position is not unlike that of the Pacific Northwest Pipeline Corp. in *El Paso*. Yamaha's ability to inspire the fear of competition in the hearts of U.S. manufacturers was already clear before Yamaha entered the joint venture. The U.S. manufacturers, including Brunswick,[37]

[37] *See* pp. 11-12, *supra*.

were wary of foreign entry, particularly in the low horsepower end of the market. Brunswick didn't want to pay the "price" it felt U.S. automakers had "to foreign firms for abandoning the low price, compact market." CX 8-A. For its part, OMC took quick steps to modify its motors to keep them competitive with the new Yamaha 25 h.p. models in 1972, I.D. 204, a product design modification that was a current response to Yamaha's competition.

Yamaha had in fact sold outboards in the U.S. on two separate occasions, and it was looking to try again. "Unsuccessful bidders are no less competitors than the successful one."[38] Pacific Northwest had a present impact on the actions of competitors in the relevant market. No less so did Yamaha—particularly with respect to technological changes responding to features displayed by Yamaha at the Tokyo boat show. We, too, "would have to wear blinders" not to see that Yamaha's efforts to enter the U.S., its successes in outboard markets elsewhere, its track record with other products in the U.S., and the probability that U.S. entry efforts would continue absent the joint venture "had a powerful influence" on the U.S. outboard motor manufacturers.[39]

C. *The Problem of Duration of the Joint Venture*

As noted, the competitive value of independent entry into the U.S. by Yamaha would far exceed that of the dependent Mariner. Respondents' argument that the joint

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[38] 376 U.S. at 661.

[39] 376 U.S. at 659.

> "Certainly the exclusion of what would promise to be an important independent competitor from the market may be sufficient, in itself, to support a finding of illegality under §7."

FTC v. *Procter & Gamble Co.*, *supra*, 386 U.S. at 568 (Harlan, J., concurring).

venture improved competition by introducing a new competitive force into the U.S. market therefore fails.

But respondents argue, and the ALJ agreed, that any anticompetitive effects of the transactions were overcome by the fact that the joint venture was terminable by either party at the end of its initial ten-year term (in 1982) by giving notice of termination three years in advance. The short life of the venture, the ALJ found, would "enhanc[e] the probability of an early unilateral entry by Yamaha into the market" sometime after 1982. I.D. at 92.

We find this reasoning to be unpersuasive and unsupported by the record. Even putting the best face on it, respondent would have us ignore a significant lessening of competition for the ten-year life of the venture in return for a wholly speculative increase in competition in the future. Respondents assure us of the likelihood of the venture's timely demise, but have adduced no reliable evidence that it will terminate, that Yamaha, as a result of the joint venture, would be strengthened as a potential competitor in the U.S. outboard market over what it was in 1972, or that Yamaha would in fact enter the U.S. market upon the venture's asserted termination in 1982.

Even assuming respondents are correct, and Yamaha does act to terminate the agreement at its first opportunity, we find nothing to support the contention that Yamaha in 1982 would be a more likely entrant than it was in 1972.[40] For example, respondents continually stressed the lack of a dealership system as a barrier to Yamaha's entry into the U.S. in 1972, based on Yamaha's purported inability to supply a line of motors of the requisite depth. We found such a barrier to have been surmountable by Yamaha in 1972, both through the availability of other

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[40] *See* discussion, pp. 17-24, *supra*.

distribution systems and by Yamaha's manufacture of a sufficiently "full" line.[41] Even if respondents were correct and distribution problems were a significant barrier in 1972, they fail to explain, and we fail to see, how Yamaha will be in a better position vis-a-vis a dealership system in 1982.[42]

The record does not support respondents' assertion. While a limited term joint venture in many circumstances will be more procompetitive than one with an indefinite term, here we have only self-serving assertions by *Brunswick* that *Yamaha* will act to terminate the venture. CX 108-0; CX 81-A; Tr. 792. Such "uncabined speculation"[43] cannot replace the reduced competition that occurred when Yamaha entered the joint venture.

D. *Collateral Restrictive Agreements*

Certain reductions in competition between the parents are an inevitable consequence of a joint venture agreement. For example, it is to be expected that the joint venturers will put their venture-related business into the venture and "not compete with their progeny."[44] The Supreme Court has recognized[45] that these limited reductions in competition are often necessary to make a joint

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[41] *See* discussion, pp. 21, *supra*.

[42] Arguably, Yamaha would be in a worse position, having to compete with an additional "major" brand that didn't exist in 1972—Mariner—for dealers in 1982.

[43] *BOC International, Ltd.* v. *FTC*, *supra*, 557 F.2d at 29.

[44] *U.S.* v. *Penn-Olin*, *supra*, 378 U.S. at 168.

[45] *See, e.g., U.S.* v. *Penn-Olin*, *supra*, 378 U.S. at 169; *U.S.* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd*. 341 U.S. 593 (1951).

venture operate efficiently, and therefore may escape the strict application of *per se* rules.

But such agreements, to be legitimately ancillary to a joint venture, must be limited to those inevitably arising out of dealings between partners, or necessary (and of no broader scope than necessary) to make the joint venture work.[46]

Three collateral agreements, associated with the joint venture formation, strike us as unreasonable agreements under Section 5.

First, the joint venture agreement between Brunswick and Yamaha resulted in a separate territorial limitation on Yamaha's ability to sell outboard motors. Under the agreement, Yamaha had the exclusive right to market the joint venture output in Japan, under the "Yamaha" label. Mercury was permitted to continue to sell "Mercury" motors in Japan, CX 1-K; CX 79-G, but "Mariner" brand engines could not be sold there. As to competition in the U.S., Yamaha was precluded from selling joint venture output in North America, leaving Mariner as the exclusive marketer of Sanshin-produced motors, and of course Mercury continued marketing "Mercury" motors in the U.S. Yamaha was also barred from "directly or indirectly manufactur[ing] engines the same or substantially the same as those which are or will be manufactured by Sanshin" and from "purchas[ing] for resale such marine engines from any third parties." CX 1-M. Yamaha had been buying and reselling outboards before entering the joint venture. CX 9-F. The joint venture agreement made specific provision for Yamaha to continue its purchases of motors for resale, but only for resale in Japan. CX 1-M.

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[46] *U.S.* v. *Columbia Pictures Corp., supra,* 189 F. Supp. at 178. *See also* Sullivan, *Handbook of the Law of Antitrust,* 219-224.

Prior to the joint venture, Yamaha had sold Sanshin-produced outboards in Japan, in competition with Mercury. CX 97-D; CX 111-B. It may be that an agreement whereby Yamaha had the exclusive right to market joint venture output in Japan and Brunswick had the exclusive right to market joint venture output in North America *might* have been reasonably necessary to the operation of the joint venture, but we need not reach that question. The agreements here did more. The agreements left Brunswick free to market outboards in competition with the joint venture worldwide (including Japan) through its Mercury brand, but Yamaha is left unable to manufacture or acquire non-joint venture outboards for sale anywhere but Japan. In effect, Yamaha is foreclosed by the agreement from continuing pre-existing competitive efforts in the U.S., a division of markets outside the ambit of the joint venture.[47] It cannot be argued that such a limitation is necessary to protect the joint venture. Here the venture was in direct competition with Brunswick in the U.S., and with both parents in Europe. There is no plausible reason Yamaha should not have been free—as Brunswick was free in Japan—to sell non-Sanshin products in the U.S. In any event, no reasons were offered by respondents. Elimination of Yamaha as an actual and potential competitor in the U.S. outboard motor market, through the joint venture or otherwise, has no relation to the efficient functioning of

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[47] *U.S.* v. *American Smelting and Refining Co.*, 182 F. Supp. 834, 858-60 (S.D.N.Y. 1960). In that case, two competitors divided the national market in lead by the device of one granting an exclusive sales agency to the other. Prior to the agreement, both companies sold lead in the eastern U.S. The contract made one the exclusive sales agent for the other in the east. As a result, each company was relieved of the other's competition for sales in its part of the country. The arrangement was struck down on a *per se* theory as an illegal division of markets.

Sanshin, and only serves the anticompetitive goal of insulating Brunswick from Yamaha in the U.S. It is, in the language of *Penn-Olin*, a "collateral restrictive agreement"—here, the elimination by agreement of an actual and potential competitor in the U.S. market.

Second, Brunswick and Yamaha independently agreed to limit competition between themselves in the "non-exclusive markets," principally Europe and South America. In 1973, the Senior Managing Director of Yamaha wrote to the President of Mercury to ask that:

> in establishing MMI [Mariner] sales network in the non-exclusive markets, you refrain from inviting Yamaha's existing distributors/dealers to join MMI's sales network. Also, in order to avoid struggling with each other for new distributors/dealers by competing in the terms and conditions each party offers, we would like to propose to have as frequent meetings as possible. CX 76-B.

Mercury's President (who was also Mariner's Chairman) agreed to cooperate.

> We agree that we will not seek out Yamaha's distributors or dealers in the non-exclusive market but, in some area, such as Europe with its great number of subdealers, we may find dealers handling not only Yamaha and International's [Mariner's] line but Mercury, OMC and other brands as well, in spite of our efforts to keep them separate. As a matter of good business, we recognize that, although we have separate marketing organizations, our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers. CX 77-C.

This agreement goes beyond anything that might reasonably be required to further a legitimate objective of the joint venture. While we do not have to decide whether competition between Mariner and Yamaha (the two sellers of joint venture output) could be reduced by an agreement

of this sort without violating the law, the agreement here was a direct limitation of competition between Brunswick and Yamaha, a subject outside the ambit of the joint venture. It is, on its face, a naked agreement between horizontal competitors to direct their competitive efforts away from each other—not to compete—in certain markets. Such an agreement can not be hidden "under the cloak of a joint venture."[48]

Third and finally, Brunswick and Yamaha entered into a Technical Assistance Agreement as part of the joint venture, granting reciprocal non-exclusive, non-assignable licenses in each other's technical information. CX 1-Z-29-46. The use of such information by either party was limited, however, to the manufacture, use and sale of goods which were not competitive to the goods manufactured by the granting party. CX 1-Z-30. As a result, Mercury, for example, could not manufacture motorcycles without raising questions as to the extent to which Mercury had used Yamaha's technical information. As if to underscore the conclusion that the intent of this agreement was to lessen competition between Brunswick and Yamaha, Mercury made an additional promise: that because it would be too difficult to tell when Yamaha technical information was in fact used in a Mercury product, Mercury agreed "not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution" of the joint venture agreement except snowmobiles. CX 1-Z-39.

Respondents contend that these limitations are of narrow scope and of limited duration. RAB 44-5. The ALJ found them to be reasonably related to providing for the free flow of technical information regarding outboard motors, I.D. 97, and to have had no adverse effect on competition since Mercury no longer produced boats and had "no intention of manufacturing motorcycles." I.D. at 96.

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[48] *U.S.* v. *Timken Roller Bearing, supra,* 118 F. Supp. 41, 219. *See also U.S.* v. *Penn-Olin, supra,* 378 U.S. at 176.

We have already discussed respondents' claim that the joint venture was of limited duration.[49] We find that claim to be without support. But even if it were not, we would find this limitation of competition to be an unreasonable extension of the scope of the joint venture, and not to be necessary to the efficient functioning of the joint venture. While outboard motor technology is related to motorcycle technology, this agreement would keep Mercury from marketing a wholly new type of motorcycle, scooter, motorized bicycle or anything that might conceivably be "a product competitive to" Yamaha's motorcycles.[50] This, in our view, impermissibly extends the product coverage of the agreement without any offsetting procompetitive effect on the joint venture itself.

VI. *Remedy*

The object of the remedy in this case is to dissipate the anticompetitive effects of the joint venture insofar as it is possible to do so. While we cannot turn back the clock, we can seek to restore the market structure to that which existed at the time the venture was entered upon. Our goal is to restore Yamaha as an actual and a potential competitor, in the U.S. outboard motor market, in at least as vigorous a form as it was in 1972 and to enjoin the collateral restrictive agreements.

The ALJ, having decided the complaint should be dismissed, failed to make findings or recommendations re-

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[49] *See* discussion, pp. 25-6, *supra*.

[50] We need not reach the question of the extent to which a patent holder may limit his licensee's operations. Although patents are included in the joint venture's definition of "technical information," much non-patent information is included as well. None of the agreements in question distinguishes patents from other kinds of information or places different use restrictions on patents than on other information.

garding remedy. We find the record is inadequate at this time for us to formulate an appropriate remedy. Indeed, we lack sufficient information to be able to determine how effective a particular remedy might be.

The preferred relief when a violation of §7 has been found is divestiture. *U.S.* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961). The joint venture between Brunswick and Yamaha must be terminated and the restrictive agreements enjoined. The record is not sufficient at this time for us to determine what, if any, related or additional relief may be required. The Mariner brand will revert to Brunswick should the joint venture simply be terminated and no other provisions adopted; distributors carrying that brand would naturally continue to look to Mariner for supply. We do not know, however, whether Mariner has access to manufacturing capacity aside from Sanshin to source its line. Nor do we know how many dealers Mariner has, whether they are on one-year contracts, whether they may or do carry more than one line of motors, whether they could easily switch to Yamaha as a source of supply, and so on.

Achieving the principal goal of the remedy in this case—restoring Yamaha as an actual potential competitor—should not be accomplished at the expense of the Mariner dealers if that is avoidable. Nor can it be accomplished without a record on the basis of which we can assess the effect Mariner has had and continues to have on the structure of the U.S. market.

Therefore we feel that a strictly limited remand is in order. The sole question for the parties and the ALJ is the shape a final order should take. Such a narrow question should require neither extensive new evidence nor protracted hearings. Similarly, only limited briefing time should be necessary. An appropriate order is appended.

DATED: November 9, 1979

Filed: May 2, 1977

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9028

In the Matter of
BRUNSWICK CORPORATION,
a corporation,
YAMAHA MOTOR CO., LTD.,
a corporation, and
MARINER CORP.,
a corporation.

INITIAL DECISION

James P. Timony
Administrative Law Judge

May 2, 1977

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INITIAL DECISION

James P. Timony, Administrative Law Judge

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PRELIMINARY STATEMENT

By a Federal Trade Commission complaint issued on April 15, 1975, respondents Brunswick Corporation

("Brunswick"), Yamaha Motor Co., Ltd. ("Yahama"), (a Japanese company), and Brunswick's wholly-owned subsidiary Mariner Corp. ("Mariner") are charged with violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by a transaction involving a joint venture agreement.

The complaint alleges that, pursuant to the agreement, Brunswick and Yamaha divided controlling interest in another Japanese company, Sanshin Kogyo Co., Ltd. ("Sanshin"), which would manufacture outboard motors in Japan under the "Mariner" trademark for distribution in the United States, among other places, by Mariner, and Yamaha agreed not to sell "Yamaha" trademark outboard motors in those places reserved for Mariner. The complaint further alleges that the agreement provides, among other things, that Yamaha would not manufacture any marine engine the same as those manufactured by Mercury and that licensing arrangements pursuant to the joint venture agreement provide that Mercury agrees not to manufacture any product competitive with those manufactured by Yamaha except snowmobiles.

The complaint alleges that the relevant product market is outboard motors, and relevant submarkets are outboard motors over and under 20 horsepower.

The complaint alleges that the effects of the joint venture may be substantially to lessen competition or to tend to create a monopoly in the manufacturing and/or marketing of outboard motors in the United States in the following ways:

(a) Substantial potential competition between Brunswick, Yamaha and Mariner may be eliminated;

(b) The combination of Yamaha with Brunswick and Mariner may tend to:

i. increase barriers to entry of new effective competition in the relevant market in the United States;

ii. increase previously existing high levels of concentration in the United States; and

iii. precipitate additional acquisitions or mergers in the United States between other outboard marine engine manufacturers and marketers, which effect may be to eliminate actual and potential competition;

(c) Manufacturers and marketers of outboard marine engines may have been denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer.

By answers filed on June 10, 1975, and July 22, 1975, respondents Brunswick and Mariner and respondent Yamaha admitted in part and denied in part the various allegations of the complaint; Yamaha also denied personal jurisdiction and moved for a determination of the jurisdictional issue.

By order dated March 19, 1976, the complaint was amended to substitute Mariner Corp. as a respondent in the place of Mariner International Co. By an order dated April 9, 1976, the Commission remanded to the administrative law judge a certified motion to amend the complaint by adding "affecting" commerce language to the jurisdictional allegations of the complaint. By order dated April 12, 1976, I was substituted as administrative law judge because of the heavy workload of the former administrative law judge. By order dated May 6, 1976, the complaint was amended to include "affecting" commerce language in the jurisdictional allegations. Respondent Yamaha

thereafter withdrew its motion to dismiss based on jurisdictional issues. Numerous discovery pleadings were filed, the record showing 49 orders entered in this docket.

Hearings started on October 5, 1976, in Washington, D.C., and were resumed in Honolulu, Hawaii, upon the unopposed motion by respondent Yamaha for the testimony of officers of Yamaha who came from Japan for the hearings. The defense case started in Honolulu and concluded on December 21, 1976, in Washington, D.C., where the record was closed. The record consists of 866 pages of testimony and 165 exhibits, many multi-paged. On February 7, 1977, the parties filed proposed findings and *in camera* proposed findings. On February 22, 1977, the parties filed reply briefs.

This proceeding is before me upon the amended complaint, answers, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and counsel for respondents. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding.

The findings of fact include reference to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX—Commission's Exhibit, followed by number of exhibit being referenced.

BX—Respondents Brunswick and Mariner's Exhibit, followed by number of exhibit being referenced.

YX—Respondent Yamaha's Exhibit, followed by letter of exhibit being referenced.

Tr.—Transcript, preceded by the name of the witness, followed by the page number.

Brunswick Admissions—Answer of Brunswick Corporation to Complaint Counsel's Initial Request for Admissions—9/18/75.

Yamaha Admissions—Yamaha Answers to Request for Admissions—9/10/75.

Stipulation No. 2—Dated 11/3/76.

FINDINGS OF FACT

1. Identity and Business of Respondents

A. Brunswick Corporation

1. Brunswick Corporation ("Brunswick") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at Brunswick Center, One Brunswick Plaza, Skokie, Illinois. (Complaint, ¶ 1; Brunswick Amended Ans., ¶ 1.)

2. Brunswick is a diversified manufacturer and marketer of medical products and numerous recreational items, including outboard and stern drive motors, snowmobiles, and bowling equipment. For fiscal year 1973, Brunswick's net sales exceeded $683 million. Net income was $39 million, and assets totalled $550 million in that year. (Complaint, ¶ 2; Brunswick Amended Ans., ¶ 2.)

3 In 1961, Brunswick acquired Kiekhaefer Corporation, now the Mercury Marine Division ("Mercury"),[1] which was and is principally engaged in the production and marketing of marine engines, including the "Mercury" line of outboard motors. Mercury manufactures and sells outboard motors, stern drives and inboard marine engines and snowmobiles. (Complaint, ¶ 3; Brunswick Amended Ans., ¶ 3; Anderegg, Tr. 186.)

4. In 1972, Brunswick, through its Mercury division sold approximately 114,000 outboard motors in the United States. (Brunswick Amended Ans., ¶ 25.) Mercury's dollar value and unit volume of outboard motor sales in 1973 exceeded $80 million and 130,000 units respectively. Mercury is the second largest outboard motor manufacturer in the United States. (Complaint, ¶ 3; Brunswick Amended Ans., ¶¶ 3 and 25.)

5. Mercury manufactures and sells in the United States and sells throughout the world outboard motors ranging from 4 to 175 horsepower. (Complaint, ¶ 4; Brunswick Amended Ans., ¶ 4; BX 26.) At least from 1971 to date, Mercury has sold outboard motors in Canada, Australia, Europe and Japan. (CX 97D-I, 101A-B.)

6. In the course and conduct of its business, Brunswick, at all times relevant to the complaint, has sold and shipped outboard motors in interstate commerce, has engaged in interstate commerce and has been a corporation whose business has been in or has affected interstate commerce. (Complaint, ¶ 5; Brunswick Amended Ans., ¶ 5.)

B. Mariner Corporation

7. Respondent Mariner Corporation ("Mariner") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office

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[1] "Mercury" as used hereinafter in this decision means respondent Brunswick.

and place of business at 1939 Pioneer Road, Fond du Lac, Wisconsin. (Complaint, ¶ 13; Brunswick Amended Ans., ¶ 13; Anderegg, Tr. 190.)

8. Mariner is a wholly-owned subsidiary of Brunswick. (Brunswick Amended Ans., ¶ 15; Anderegg, Tr. 192.) Mariner was formed to become a joint venture partner with Yamaha Motor Company, Ltd. and a world-wide distribution organization for marketing the joint venture products known as "Mariner" outboard motors. (Brunswick Response to Complaint Counsel's Discovery Request, 12/8/75. ¶ 4(c); Anderegg, Tr. 191.) Mariner was formed on December 27, 1972. (*Ibid.*)

9. Between December 27, 1972, and May 15, 1974, Mariner operated under the corporate name of Mercury Marine International Company. (Brunswick Amended Ans., ¶ 13.) From May 15, 1974, to June 17, 1974, Mariner operated under the name Mariner International Corporation, and on that date, its name was changed to Mariner Corporation and it became a holding company. A new firm was formed to handle distribution. (Response of Brunswick to Complaint Counsel's Discovery Request, 12/8/75, ¶ 4(a); Anderegg, Tr. 184-85, 210.)

10. Mariner International Co. is a wholly-owned subsidiary of Mariner, organized in 1974 to handle the world-wide marketing of "Mariner" brand outboard motors. (Anderegg, Tr. 184-85.) The President of both Mariner and Mariner International Co. is Robert Anderegg. (Anderegg, Tr. 185.)

11. In 1973, the principal assets of Mariner were 62,000 shares of stock of Sanshin Kogyo Co., Ltd. (Brunswick Amended Ans., ¶ 15; Anderegg, Tr. 185, 191.) Acquisition of these shares was the result of the joint venture between Brunswick and Yamaha Motor Company, Ltd. (See *infra*, Finding 37.)

12. From 1973 through 1976, officers of Mariner have been members of the Board of Directors of Sanshin Kogyo Co., Ltd. As Board members, these officers attended meetings in Japan in 1973 and 1974 regarding the business of Mariner. (Anderegg, Tr. 184, 194, 196-97.)

13. During 1973, Mariner communicated, on the average, weekly with Japan (*i.e.*, Yamaha Motor Co., Ltd. and/or Sanshin Kogyo Co., Ltd.) by telex, telephone and mail communications regarding the joint venture and marketing of "Mariner" brand outboard motors. In mid-1974, the frequency of these communications increased to a daily basis. (Anderegg, Tr. 198-99.)

14. Mariner filed annual reports for 1973 and 1974 with the Japanese Government. A law firm located in Japan was utilized to assist Mariner in the preparation of these reports. (Anderegg, Tr. 204.)

15. In the course and conduct of its business during 1974 and 1975, Mariner sold outboard motors in Asia, Europe, Latin America, North America, the South Pacific, the Middle East, New Zealand and Australia. (CX 99A and C; BX 25A-B, W, Z, Z-4, Z-7; Anderegg, Tr. 208-09, 774-75.)

16. In mid-1975, Mariner began promoting the "Mariner" brand of outboard motors in the United States. (Brunswick Amended Ans., ¶ 14.) In late 1976, Mariner commenced importing Mariner outboard motors for sale in the continental United States. (BX 25Z-2, Z-4, Z-7.)

17. Mariner has been and is engaged in interstate commerce and has been and is affecting interstate commerce. (Brunswick Amended Ans., ¶ 14.)

C. Yamaha Motor Co., Ltd.

18. Respondent Yamaha Motor Co., Ltd. ("Yamaha") is a corporation organized and existing under the laws of Japan and has its principal place of business in Japan. (Complaint, ¶ 6; Yamaha Amended Ans., ¶ 1.)

19. Yamaha was incorporated in Japan in 1955; its main investor was Nippon Gakki Co., Ltd., a Japanese corporation which manufactures musical products and sporting goods. Prior to Yamaha's incorporation, Nippon Gakki had started a trial production of motorcycles. When Nippon Gakki decided to go into real production, Yamaha was incorporated separately for that purpose. (Eguchi, Tr. 684, 648-49.) In October 1972, Nippon Gakki was the largest individual stockholder of Yamaha stock with 39.11%. The second largest stockholder held 5.03%. (CX 105, 116P.)

20. Since 1961, Yamaha has manufactured and/or sold snowmobiles, motorcycles and spare parts to Yamaha International Corporation, which in turn distributes said products in the United States. (Complaint, ¶ 9; Yamaha Amended Ans., ¶ 4, Hudson, Tr. 732.) In 1972, Yamaha manufactured and/or sold for export motorcycles, snowmobiles, outboard motors and fiberglass boats. (Eguchi, Tr. 644, 646-47.)

21. In 1972, Yamaha's total sales in dollar value were approximately $405 million (Yamaha Amended Ans., ¶ 1; Eguchi, Tr. 647.) Approximately 70% of these sales were accounted for by export sales and approximately 40% of Yamaha's total sales were made for export to the United States. (Eguchi, Tr. 647.)

22. As stated in a 1972 Business Report to Stockholders, Yamaha's export sales in yen for the fiscal year amounted to about 70% of the total sales. Of Yamaha's

export sales, about 78% was in motorcycles, 3% in boats and outboard motors, and 18% in snowmobiles, parts and other items. (CX 114D.)

23. In 1974, Yamaha's total sales were approximately $500 million. (Eguchi, Tr. 647-48.) The present total sales volume of Yamaha-brand products is approximately $650 million annually. (Yamaha Admissions, ¶ 1.)

24. At all times relevant herein, Yamaha has been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended. (Complaint, ¶ 12; Yamaha Amended Ans., ¶ 7.)

D. Sanshin Kogyo Co., Ltd.

25. Sanshin Kogyo Co., Ltd. ("Sanshin"), a Japanese corporation, was established on February 22, 1960, and its principal office is in Hamamatsu City, Japan. (Yahama Motion to Dismiss, 10/20,/75, ¶ 2.)

26. Yamaha produced outboard motors at Yamaha facilities until May 1969 when it purchased control of Sanshin by acquiring 60% of the stock of Sanshin. After the stock acquisition, Yamaha transferred all of its tools for making outboards to Sanshin and continued distributing "Yamaha" brand outboards made thereafter by Sanshin. (Yamaha Motion to Dismiss, ¶ 2; Yamaha Admission, ¶ 51; Yamaha Amended Ans., ¶ 2; CX 1A, 9D, 9I, 13B; Eguchi, Tr. 645-46, 666.)

27. Since 1969, Sanshin has produced all "Yamaha" brand outboard motors. (Yamaha, Amended Ans., ¶ 2; Eguchi, Tr. 665-67; Anderegg, Tr. 772; CX 1A.) In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha, of which 25,000 were

exported. (Complaint, ¶ 7; Yamaha Amended Ans., ¶ 2.) In 1973, Sanshin produced approximately 80,000 outboard motor units. (Eguchi, Tr. 669.)

E. Yamaha International Corporation

28. Yamaha International Corporation ("YIC") is a California corporation with its principal place of business in Buena Park, California. (Yamaha Amended Ans., ¶ 3.)

29. YIC was incorporated in 1960 as a wholly-owned subsidiary of Nippon Gakki. (Complaint, ¶ 8; Yamaha Amended Ans., ¶ 3; Hudson, Tr. 729.) YIC was incorporated to distribute musical instruments manufactured by Nippon Gakki, and motorized products manufactured by Yamaha in the United States. (Yamaha Admissions, ¶ 13; Eguchi, Tr. 653-54.)

30. Before YIC was incorporated in 1960, exports of Yamaha-manufactured products were handled by the International Department of Nippon Gakki. (Stipulation No. 2, #16.) From 1960 to November 1973, YIC was the exclusive distributor for Nippon Gakki in the United States. (Hudson, Tr. 743-44.) From 1961 to date, YIC has been the exclusive distributor of Yamaha products in the continental United States (YX A; Callaway, Tr. 257; Eguchi, Tr. 660; Hudson, Tr. 732-33, 739-40, 744.)

31. In 1972 and 1976, approximately 90% of YIC's sales consisted of Nippon Gakki and Yamaha products. In both 1972 and 1976, two-thirds of that 90% consisted of products manufactured by Yamaha. (Hudson, Tr. 742-44.)

32. YIC is the only corporation licensed by Nippon Gakki, who own the "Yamaha" brand trademark, to use such trademark in the United States. (YX B2; YX B10.) YIC is also authorized to relicense or sublicense others, such as independent dealers, to use the trademark in con-

nection with the sale of Yamaha products. (Hudson, Tr. 738.)

33. From 1961 to date, Yamaha and YIC have, by telephone, telex, mail and other means, communicated with each other in excess of 500 times each year. Such communications have included, but are not limited to, marketing studies, engineering reports, suggestions by either party for improvements to Yamaha-manufactured products, sales reports, warranty and service information. (Stipulation No. 2, #5.)

34. From 1964 to date, Yamaha has sent personnel to various points in the United States to assist YIC in the inspection and testing of Yamaha-manufactured products distributed by YIC in the United States. (Stipulation No. 2, #7.)

35. From 1964 to date, Yamaha has sent service technicians and engineering personnel to YIC to assist with technical design and mechanical problems relating to Yamaha-manufactured products. (Stipulation No. 2, # 8.)

II. The Transaction

36. From late 1971 to March 1972, Mercury and Yamaha conducted negotiations regarding a possible joint venture for the production and marketing of outboard motors. A memorandum of understanding was concluded March 9, 1972. (CX 10A - 10E.) The parties agreed to create "a new manufacturing joint venture to be established in Japan between Yamaha Co. . . . . through its subsidiary Sanshin Industries Co., Ltd. . . . and Mercury Marine Division of Brunswick Corporation. . . . through a subsidiary to be formed and to be named Mercury Marine International Co. [Mariner]." (CX 10B.)

37. On November 21, 1972, Brunswick entered into a joint venture agreement with Yamaha wherein it was provided that Mariner would purchase 62,000 shares of newly issued shares of Sanshin stock for approximately $1.4 million. (Brunswick Amended Ans., ¶ 15; Yamaha Amended Ans. ¶ 9.)

38. With the purchase of Sanshin stock, Mariner and Yamaha each owned 38% of the total outstanding stock of Sanshin: the remaining 24% of the Sanshin stock is held by individual Japanese shareholders. (Brunswick Amended Ans., ¶ 15; Yamaha Amended Ans., ¶ 9.)

39. The joint venture agreement provided that the corporate name of Sanshin would be changed in due course to Mercury-Yamaha Mfg. Co., Ltd., or some other corporate name as agreed upon by the parties which would contain reference to both Yamaha and Mercury. (CX 1 O.)

40. The joint venture agreement gives Yamaha the right to appoint six of Sanshin's eleven directors, the remaining directors to be appointed by Mariner. The President of Sanshin is appointed by Yamaha from among the directors it nominates. (CX 1H.) Passage of corporate resolutions in specific areas requires an affirmative vote of seven directors; all other corporate resolutions can be adopted by a majority vote provided a quorum of seven directors is present at a Sanshin Board meeting. (CX 1H - 1J.)

41. An operating committee composed of two Yamaha appointed directors or their representatives and two Mariner appointed directors was provided for in the joint venture agreement. The operating committee was to meet regularly to review major operating and policy matters. Matters on which no agreement could be reached were to be referred to the Board of Directors of Sanshin for resolution. (CX 1J.)

42. The joint venture agreement will remain in effect for a period of 10 years after the Sanshin stock purchase. Unless notice of termination is given by either party three years prior to the expiration of the initial term, or any extended term, the agreement is automatically extended for three year periods, subject to any necessary Japanese Government approvals. (CX 1R; Brunswick Amended Ans., ¶ 20; Yamaha Amended Ans., ¶ 13.)

43. Article 8.4 of the joint venture agreement provided that Sanshin would continue to manufacture outboard motors under the "Yamaha" label for sale to Yamaha for exclusive distribution in Japan. Outboard motors produced by Sanshin bearing the "Mariner" label would be sold to Mariner for exclusive distribution in North America and Australia. The balance of the Sanshin-produced outboard motors would be sold to a proposed equally-owned joint venture sales company for distribution in the rest of the world under the "Mariner" trademark and, in those countries mutually agreed upon, under the "Yamaha" trademark. (CX 1K - IL.)

44. In October 1973, Yamaha and Mariner amended certain provisions of the joint venture agreement. They agreed that it was inappropriate to attempt to form a joint venture sales company for marketing Sanshin products in certain areas of the world and that, therefore, both partners would be free to conduct their own independent marketing programs in those territories which the joint venture agreement contemplated would be served by a joint venture sales company. (CX 78A.) The term "North America" as used in the joint venture agreement was clarified to include Canada, the United States of America, and the United States of Mexico. (CX 78C.) The parties further agreed that Mariner would have the exclusive right to sell in North America the products of Sanshin and/or

marine engines purchased from Mercury. In the case of Mexico, however, Yamaha could continue to sell the existing outboard motors selected by the Mexican Government for their fishing program. The parties also agreed that New Zealand would be included in the exclusive territory of Mariner. (CX 78C.)

45. Under Article 8.1 of the joint venture agreement, Yamaha and Mariner have been and are the only purchasers of products which Sanshin manufactures. (CX 1K.) Yamaha sells Sanshin-made products under the trademark "Yamaha" and/or other agreed upon trademarks; Mariner sells Sanshin-made products under the trademark "Mariner" and/or other agreed upon trademarks. (CX 1L.) Pursuant to the joint venture agreement, export procedures and shipments of Sanshin products are executed exclusively through Yamaha. (CX 1K.)

46. In May 1973, Mercury and Yamaha agreed that Sanshin would produce the jointly developed small horsepower outboard motors such as the 6 and 9.8 h.p. for sale by Mercury using the "Mercury" trademark. (CX 75B.) No such sales occurred. (Resp.'s Reply, p. 29.)

47. Mercury and Yamaha incorporated in the joint venture agreement licensing arrangements whereby they agreed to exchange between themselves, and provide to Sanshin, patents and technical information relating to marine engines, other two-cycle engines and die cast and low pressure die casting techniques. (CX 1M - 1N; Brunswick Amended Ans., ¶ 18; Yamaha Amended Ans., ¶ 12.)

48. Pursuant to the joint venture agreement, the parties entered into a technical assistance agreement between Yamaha and Mercury which included, among others, the following provisions:

> 2.1 (a) Mercury hereby grants to Yamaha a non-exclusive, world-wide license to use the Mercury Tech-

nical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Mercury as of the date of the execution of this Agreement.

(b) Yamaha hereby grants to Mercury a non-exclusive, world-wide license to use the Yamaha Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Yamaha as of the date of the execution of this Agreement.

(CX 1Z-30)

* * * * * * *

6.7 Because of the difficulty of identifying when a product of Mercury incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter into this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution of this Agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles.

(CX 1Z-39)

(See also, Brunswick Amended Ans., ¶ 19; Yamaha Amended Ans., ¶ 12.)

49. Yamaha and Mercury also agreed to provide technical assistance by assisting, advising and cooperating via technical experts with each other's technical personnel in "the development, designing, research, manufacture, experimenting, quality control, and servicing of the licensee's products and in plant layout, and the selection of the machinery, tools and equipment necessary or desirable for the manufacture of said products." (CX 1Z-31.)

50. Mercury and Yamaha also agreed to permit each other's technical personnel to inspect their plants and agreed to provide instruction to such personnel concerning the processes, procedures, operating manuals and methods used by the licensor in the manufacture of its products falling within the scope of the licenses granted. (CX 1Z-32.)

51. The parties agreed that the technology exchanged would have no assigned value. (CX 9E; but see Finding 194.) Under Article 5 of Exhibit D to the joint venture agreement, Mercury and Yamaha agreed to pay an annual royalty of $25,000 to each other for the licenses granted in Section 2.1 of the technical assistance agreement. (CX 1Z-33.)

52. Technical assistance agreements were also executed between Yamaha and Sanshin and between Mercury and Sanshin in accord with provisions of the joint venture agreement. These agreements provided that Mercury and Yamaha would disclose and license to Sanshin any and all Mercury or Yamaha patents, utility models, designs (and all applications for such patents, utility models and designs), technical knowledge, specifications, standards, data, operating manuals and experience applicable to the development, designing, research, manufacture, experimenting, quality control and servicing of marine engines, whether Mercury or Yamaha owned or possessed the information at the time the technical assistance agreements became effective or later developed or acquired it during the term of the agreements. (CX 1Z-5 - 1Z-7, 1Z-18 - 1Z-19.)

53. The parties agreed in Article 10.1 of the joint venture agreement that Yamaha may not "directly or indirectly manufacture marine engines the same as or substantially the same as those which are or will be manufac-

tured by Sanshin," and may not "purchase for resale such marine engines from any third party." Provision was made, however, for Yamaha's continued purchase for resale in Japan of marine engines which Yamaha purchased and sold as of the date of the agreement and any other marine engines subsequently agreed upon by the parties. (CX 1M.)

54. Yamaha and Mercury agreed that an engineering group was to be established at Sanshin with responsibility for the design and development of all Sanshin products. (CX 1M.) Yamaha further agreed to assist Sanshin in securing personnel for the outboard motor engineering group. (CX 1 O.)

55. Prior to the joint venture with Brunswick, neither Yamaha nor Shansin attempted to buy outboard motor technology from any other outboard motor manufacturers. (Eguchi, Tr. 63.) When McCulloch stopped producing outboards in April 1969, they offered to transfer their complete engineering technology, plant and equipment to Yamaha. After consideration, this offer was declined. (CX 79C, 90L; see Finding 77.)

56. Between 1970 and 1972, Yamaha conducted product development on outboard motors for Sanshin which did not have a research and development department. Such research and development included the improvement of existing outboard motors in performance, primarily, and also the development of new motors to be added to the Yamaha line of outboard motors. (Eguchi, Tr. 671.)

57. In 1974, the Research and Development Department of Sanshin was created pursuant to the joint venture. Most of the personnel of this department were transferred from Yamaha. (Eguchi, Tr. 673.)

58. All technical assistance agreements entered pursuant to the joint venture, unless sooner terminated or extended by the joint venture agreement, remain in effect for ten years. Absent notification six months prior to the expiration of the initial term or any renewal period, the agreements are automatically renewed for three year periods, subject to necessary approvals by the Japanese Government. (CX 1Z-13, 1Z-25, 1Z-41.)

59. Absent a breach of the joint venture agreement or insolvency of one of the parties, upon termination of the technical assistance agreements, "the rights and licenses granted to each licensee pertaining to Patents etc., shall in principle be revoked . . . ." (CX 1Z-36, 1Z-10, 1Z-21.) Upon termination, rights and licenses granted between Yamaha and Mercury will be renewed at reasonable cost, upon written request of the licensee. (CX 1Z-36.) Licenses between Yamaha and Sanshin and between Mercury and Sanshin may be renewed after deliberation between the parties to the license regarding the terms and conditions of such renewals. (CX1Z-10, 1Z-21.)

60. Absent a breach of the joint venture agreement or insolvency of one of the parties, the ownership of technical information other than patents, etc., exchanged pursuant to the technical assistance agreements becomes the joint property of the parties to the agreement and thereafter may be used for any purpose whatever without obtaining the consent of the licensor. (CX 1Z-36, 1X-10, 1Z-21.)

III. *Relevant Geographic Market*

61. The relevant geographic market is the United States. (Complaint, ¶ 21; Brunswick Amended Ans., ¶ 21; Yamaha Amended Ans., ¶ 14.)

IV. *The Outboard Motor Industry*

62. The manufacture of an outboard motor[2] is a highly complex process. (BX 12R.) Fundamentally, an outboard motor is composed of three basic parts: (1) an electrical system which gives ignition and in some instances provides recharging capability for the battery; (2) a basic powerhead which is comprised of a cylinder block and associated crankshaft, connecting rods and reciprocating parts for housing components; and (3) a lower unit or leg which is principally comprised of a gear train and propeller, some method of attachment to the transom, a fuel supply, and remote electrical, shift and throttle controls in some models. (Dillon, Tr. 292-93.)

63. Outboard motors are used for a wide range of water-related activities including fishing, hunting, water skiing, cruising and commercial purposes. (CX 90G, 90Z-46, 90Z-52; Strang, Tr. 386.)

64. Between 1963 and 1972, sales of outboards in the U.S. rose by 10.9% compounded annually. During the same period, the compounded annual growth rate for consumer durable spending was 9.3% and for leisure durable expenditures 9.8%. (BX 12H.)

65. Sales, both domestic and foreign, by United States outboard motor manufacturers have increased annually. In 1965, 393,000 United States-made outboard motors, with a dollar value of $183 million, were sold. (BX 12I.) By 1971, the industry had grown to the point of 514,375 units sold, with a total dollar value of $231,443,271. (CX 92-96.) In 1972, 554,019 outboard motors were sold by United

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[2] The relevant product in this proceeding does not include electric outboard motors, inboard/outboard motors or stern drive motors. (Stipulation, Tr. 169.)

States manufacturers, with factory sales of $271,320,036. (CX 92-96.) In 1973, 585,000 outboard motor units were sold by the United States outboard motor industry, with a retail value of approximately $501,300,000. (Yamaha Amended Ans., ¶ 16.)

66. The United States outboard motor market is and, at all times relevant herein, has been the largest market for outboard motors in the world. (Stipulation No. 2, ¶ 21; Yamaha Admissions, ¶ 45; BX 12T.)

67. In 1973, imports were insignificant in the United States market and were expected to remain so. (BX 12F.) Foreign manufacturers have not been a factor in the United States outboard motor market. (Anderegg, Tr. 797.)

68. Europe, Canada, Australia, and the Far East, principally Japan, are the most important foreign markets. (BX 12T.) Foreign sales accounted for approximately 35% of the world-wide total in 1972 and were expected to increase as foreign demand grew. The "Andresen Report," a securities research report prepared for Outboard Marine Corporation (OMC) entitled "The Marine Industry and Outboard Marine Corporation" dated January 1973 (BX 12A-12SS), stated that the foreign outboard motor market was growing as fast as the U.S. market and predicted that, for 1973, foreign unit sales would increase by 6% and dollar value sales by 12%. (BX 12E, 12 O.)

69. The average horsepower of outboard motors sold in foreign markets is significantly lower than the domestic average because "foreign market development is about seven to eight years behind that of the United States." (BX 12T.)

70. The "Andresen Report" concluded that the "United States Outboard Motor Industry" was believed to offer long-term revenues and earnings growth as well as

rising return on investment with revenues of the industry growing by at least 12% during 1973. (BX 12E.) The report predicted that there would be an increase in sales of outboard motors between 1972 and 1974 at 16.1% compound annual rate of growth. (BX 12K.) The report estimated that in 1973, domestic outboard motor unit sales would increase by 7.5% and dollar value sales by 18.3%. (BX 12 O.)

71. In 1971, Mercury was expanding its outboard motor production to meet the demands for outboard motors in the United States. (Anderegg, Tr. 799.) Despite this activity, in February 1973, a Mercury study stated "Mercury Marine has, for the past several years, been plagued by a general inability to supply market demands for our marine products." (CX 71D.) Mariner's present promotional literature states that: "[O]ver the past several years demand had exceeded supply in the industry." (BX 25Z-73.)

72. Beginning with the early 50's, the outboard motor industry in the United States has witnessed a transition from low horsepower motors to larger, more sophisticated engines capable of powering larger and heavier boats. (BX 12A, 12E, 12M, 26; Dillon, Tr. 284-87.) The top horsepower for outboards sold in this country went from 25 h.p. in 1953 to 200 h. p. in 1976. (BX 26.) This trend enhances long-term industry growth potential in that high horsepower engines are more profitable than smaller outboards and wear out faster. (BX 12A, 12E.) In 1972, approximately 75% of outboard motor unit sales were for replacement purposes. (BX 12M.)

73. The manufacture and sale of outboard motors has been highly profitable. (BX 12; CX 71D.) For example, in 1973 the "Andresen Report" estimated OMC's total nonmarine sales at about $114 million, with a pre-tax profit

of $3.9 million. On total marine sales of $330 million, the report estimated OMC's profit at $58.2 million. (BX 12GG.) About one-third of OMC's outboard sales and 40% of the profit from these sales came from foreign sales. (BX 12 O.)

74. Mercury's sales have increased from $21,749,000 in 1961 to $82,737,000 in 1973. (CX 100E.) Mercury's 1973 division earnings totalled $9,888,000 on net sales of $82,737,000. For 1972, division earnings totalled $8,650,000 on net sales of $65,686,000. (CX 100E.)

75. The "Andresen Report" estimated OMC's marine products division profitability as follows: for 1971, sales were $259.5 million with a pre-tax profit of $45.7 million, resulting in a margin of 17.6%. For 1972, OMC sales were estimated at $290.6 million with a pre-tax profit of $53.7 million, for a margin of 18.4%. For 1973, the report estimated OMC sales at $330.0 million with a pre-tax profit of $58.2 million, resulting in a margin of 17.6%. (BX 12GG.)

76. OMC's return on average investment from 1970 through 1972, as reflected in the following chart, also attests to the profitability of outboard motor sales (CX 123C-123E):

Return on Average Investment

	1970	1971	1972
Johnson Division	26.0%	35.3%	43.3%
Evinrude Division	19.0%	36.3%	38.5%

77. "Historically, the outboard motor industry has been marked by a lack of significant entry and a declining num-

ber of firms." (Yamaha Amended Ans., ¶ 19.) During the period 1955-1965, competitors in the United States outboard motor industry included OMC, Mercury, Scott-Atwater, McCulloch, West Bend, Eska, Clinton and Martin. (Dillon, Tr. 283-85, 291; Anderegg, Tr. 766, 806.) During this period, Martin and Scott-Atwater exited the outboard motor industry. (Dillon, Tr. 285, 291.) In 1969, McCulloch also exited the outboard motor industry. (CX 90L; Dillon, Tr. 291; Anderegg, Tr. 766.) In 1965, Chrysler acquired all of the assets of West Bend's outboard motor operations (Dillon, Tr. 282.)

78. Between 1965 and 1970, there were only minor fluctuations in Mercury's market share in the outboard motor industry. (Anderegg, Tr. 784.) Market shares of the principal domestic competitors, as evidenced by the following charts, remained relatively stable from 1971 to 1973 (CX 92-96):

Market Shares By Units Sold

	1971	1972	1973
OMC	49.1%	50.3%	50.3%
Mercury	20.0%	19.8%	22.6%
Chrysler	8.6%	8.6%	7.8%
Eska	18.4%	15.6%	14.2%
Clinton	3.9%	5.65%	5.1%

Market Shares by Dollar Volume

	1971	1972	1973
OMC	58.3%	59.3%	59.0%
Mercury	25.1%	24.2%	26.0%
Chrysler	11.6%	11.6%	10.2%
Eska	4.0%	3.4%	3.4%
Clinton	0.9%	1.5%	1.4%

79. The top two outboard motor manufacturing companies account for in excess of 70% of outboard motor units sold. (Yamaha Amended Ans., ¶ 17.) In 1972, Mercury accounted for approximately 21% of the total unit sales of outboard motors in the United States. (Yamaha Amended Ans., ¶ 18.)

80. Barriers to entry into the outboard motor industry are significant and have remained so over time. (Yamaha Amended Ans., ¶ 19.) "[B]arriers to effective entry into the United States market for outboard motors on a competive basis are presently significant." (Brunswick Amended Ans., ¶ 26.)

81. Barriers to entry into the United States outboard motor market include capital costs, technology and know-

how, and, in addition, for the market in which high horsepower outboard motors are sold, the need to produce and sell a broad line of horsepower engines and the need to develop a sales and service network. (Findings 99, 105; CX 79F; BX 12F, 12Q-12R, 12V; Strang, Tr. 457.)

82. A market study of the United States outboard motor industry prepared for American Honda in 1969 concluded that:

> [t]he outboard motor industry is composed of two distinctly separate, but overlapping market segments; one for lower horsepower motors, usually under 20 hp, and one for higher horsepower motors, usually over 20 hp. (CX 90G.)

V. *Relevant Product Markets*

A. *Low Horsepower*[3] *Gasoline Outboard Motors*

83. A definite market for low horsepower motors, usually 20 h.p. and under, exists in the United States outboard motor industry. (CX 90G; Stipulation No. 2, #22.)

84. In 1972, OMC, Mercury, Chrysler, Clinton and Eska[4] sold low horsepower outboard motors in the United States. Although OMC, Mercury and Chrysler also produced out-

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[3] This deliniation is not clear-cut since "overlapping" exists between the low and high horsepower segments of the industry. (CX 90G.) The President of OMC feels the low market is 25 h.p. and below. Strang, Tr. 386, 438.) In an internal Yamaha memorandum, the low horsepower market was described as "less than 25 horse power." (CX 15B.) In January 1972, Mercury looked at motors 25 h.p. and under as the "low horsepower offerings." (CX 8A, 8D.) There appears to be a trend to polarization of the two categories. (CX 90G.)

[4] Eska does not manufacture outboard motors, but merely assembles them from components purchased from various manufacturers. (Kascel, Tr. 609.)

boards in the high horsepower range, Eska and Clinton did not (CX 92B, 96B; Dillon, Tr. 308; Strang, Tr. 336; Kascel, Tr. 623-24.)

85. OMC, Mercury and Eska considered OMC, Mercury, Eska, Chrysler and Clinton as competitors in 1972. (CX 72A, 73E, 109E-109F; Strang, Tr. 336; Kascel, Tr. 610.)

86. The 20 h.p. and under market shares of the principal United States competitors were (CX 92-96):[5]

Market Share by Unit Volume

	1971	1972	1973
OMC	39.1%	40.2%	39.7%
Mercury	16.9%	15.5%	19.3%
Chrysler	6.1%	5.8%	4.9%
Eska	31.2%	28.2%	29.6%
Clinton	6.6%	10.2%	9.5%

[5] These figures reflect all 20 h.p. and under outboard motor sales by United States manufacturers. No figures are available in the record which show how much of the total sales were foreign sales.

Market Share by Dollar Volume

	1972	1973
OMC	50.5%	49.0%
Mercury	20.6%	24.6%
Chrysler	9.3%	6.8%
Eska	13.5%	14.0%
Clinton	6.1%	5.6%

87. In the early 70's, Honda commenced selling a low horsepower motor in the United States. (Strang, Tr. 471.) Two to three years ago, Volvo also entered this market. (Strang, Tr. 470.) Suzuki/Arctic Cat now sells outboards in the low horsepower United States market. (Strang, Tr. 459.) Despite these foreign entries, no foreign manufacturer is considered a factor in the United States to date. (Anderegg, Tr. 797.)

88. A Mariner marketing outline presentation for 1977 describes a United States outboard motor market which includes the "Big 3" (OMC, Mercury and Chrysler) and also Eska, Spirit, British Seagull, Honda, and Volvo Penta. (BX 25Z-70.)

89. The primary use for outboard motors 20 h.p. and under is for fishing, hunting, and moving sailboats in or out of marinas. (CX 90J, 90Z-46, 90Z-52; BX 3A; BX 12Q; Dillon, Tr. 304; Strang, Tr. 386; Kascel, Tr. 611.)

90. Small outboard motors up to 20 or 25 h.p. are used on boats of up to roughly 14 feet. (Strang, Tr. 386.) Such low horsepower engines are generally portable, weighing somewhat less than 80 or 90 pounds and are clamped rather than permanently affixed to the transom of a boat. (BX 24, [Bradley] pp. 51-53; Dillon, Tr. 305; Strang, Tr. 387-88; Kascel, Tr. 612.)

91. Low horsepower outboard motors generally have manual rewind starters and a steering handle. These features do not appear in high horsepower outboard motors. (Dillon, Tr. 306; Strang, Tr. 387.)

92. Chrysler and OMC use a number of production lines in manufacturing low horsepower outboard motors. (Dillon, Tr. 201-02; Strang, Tr. 389-91.) Mr. Strang, the President and General Manager of OMC, testified, however, that, in 1972, a manufacturer could have assembled outboard motors from 2 h.p. to either 25 or 40 h.p. on one assembly line. Low horsepower outboard assembly lines utilize clamp screws rather than bolts to hold the engines in place and require less vertical space on the conveyors than high horsepower assembly lines. Small engines, due to their portability, can also be moved by hand within the factory whereas equipment is necessary to move larger outboard engines. (Strang, Tr. 392-94.)

93. Prices on low horsepower outboard motors are substantially lower than prices for high horsepower outboard motors. (CX 97; BX 25X.) For example, the 1977 model Mariner 20 h.p. outboard has a listed retail price of $875, while the 60 h.p. was listed at $1,670. (BX 25X.)

94. Prior to the initiation of price controls in late 1971, OMC low horsepower outboard motor prices were not affected by the prices of high horsepower outboard motors. (Strang, Tr. 397.)

95. Eska, during the last 5-6 years, has reduced OMC's share of the low horsepower outboard market. (Strang, Tr. 337, 476, 540-41.) As a result of the inroads being made by Eska in this market, "OMC has initiated . . . a program for the design and development of a low-cost engine to be competitive with the ESKA in price range." (Strang, Tr. 550.)

96. In 1967, Yamaha requested YIC to prepare a report on the possibility of marketing Yamaha-manufactured outboard motors by YIC in the United States, which report was prepared and sent by YIC to Yamaha. (Stipulation No. 2, #9.) This report noted that "generally speaking price competition is quite severe in the market of smaller outboard motors." (BX 3D.)

97. United States manufacturers sell low horsepower outboard motors to mass merchandisers under private labels, and to marine dealers[6] under brand labels. OMC and Mercury sell all outboard motors manufactured by them exclusively to marine dealers. (Strang, Tr. 421; Kascel, Tr. 611.) Prior to 1965, OMC sold private label outboards to mass merchandisers, as well as its "Evinrude" and "Johnson" brands to marine dealers. (Strang, Tr. 422.) Chrysler sells outboard motors to both marine dealers and mass merchandisers. (CX 94E; Dillon, Tr. 290-91, 308, 310.) Chrysler's private label outboards contain

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[6] The term "marine dealer" refers to a dealer selling a full horsepower range of outboard motors as well as boats, trailers, and accessories. In addition, many sporting goods or hardware stores may stock part of a line of outboard motors for resale. (CX 90Z-19; Strang, Tr. 424.)

essentially the same powerhead and major components as its "Chrysler" label outboard motors. (Dillon, Tr. 312.) Eska and Clinton sell all outboard motors manufactured or assembled by them exclusively through mass merchandisers such as Sears, Penneys, Western Auto and other large chains and dealers. (BX 24, [Bradley] p. 28; Dillon, Tr. 311; Strang, Tr. 337, 423; Kascel, Tr. 608-10, 619.)

98. Low horsepower outboard motors sold through mass merchandisers compete with outboard motors of comparable horsepower sold through marine dealers. (BX 24, [Bradley] p. 33; Brunswick Admissions, pp. 20-21.)

B. *High Horsepower Gasoline Outboard Motors*

99. A recognized market exists for high horsepower motors, usually over 20 h.p. (CX 90G.) Existence of this separate market was explicitly noted in the "Andresen Report" which stated (BX 12R):

> Market entry appears to be further restricted when the large horsepower market is examined. Only OM, Brunswick, and Chrysler Corporation are producing high quality, larger horsepower motors in quantity. OM produces over half of these engines and the Mercury division of Brunswick produces 30%. Chrysler has been able to make only narrow inroads into this market. Furthermore, the need for the broad distribution and highly skilled service should serve to protect the domestic higher horsepower market from foreign competition.

100. In 1972, OMC, Mercury and Chrysler were the only United States manufacturers selling high horsepower outboard motors up to 150 h.p. in the United States. (CX 90Z-4; BX 26; Dillon, Tr. 308; Strang, Tr. 336.)

101. The above 20 h.p. market shares of the principal United States competitors were (CX 92-94):[7]

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[7] These figures reflect both domestic and foreign sales of high horsepower outboards by United States manufacturers.

Market Share by Unit Volume

	1971	1972	1973
OMC	63.4%	62.8%	62.4%
Mercury	24.5%	25.1%	26.4%
Chrysler	12.1%	12.1%	11.2%

Market Share by Dollar Volume

	1972	1973
OMC	61.9%	62.0%
Mercury	25.8%	26.8%
Chrysler	12.3%	11.2%

102. High horsepower outboard motors are used for sport and recreation, such as for water skiing or cruising. (CX 90Z-46, 90Z-52; Dillon, Tr. 304-05; Strang, Tr. 386.)

103. Outboard motors ranging from 30 to approximately 65 h.p. are used on boats up to 16 or 17 feet. Out-

board motors of 70 h.p. and above are used on boats from 17 to 18 feet and up. (Strang, Tr. 386-87.) High horsepower outboards are bolted onto the boats rather than clamped to the boat transom. (Strang, Tr. 392-93.) Outboard motors of 35 h.p. and above are generally not portable. (Dillon, Tr. 305-06.) For example, Mariner's 85 h.p. outboard motor weighs approximately 254 pounds. (BX 25Z-30.) Generally, moving heavier, high horsepower outboard motors requires two people and may require special equipment, such as a forklift truck. (Dillon, Tr. 323-24.)

104. Outboard motors in the 35-65 h.p. range generally come equipped with electric starters, as opposed to manual (or rope recoil) starters, commonly found in the 20 h.p. and below category. (Dillon, Tr. 306-07.) Optional front controls rather than steering handles are also normal equipment on high horsepower outboard motors. (Dillon, Tr. 306.)

105. Advanced technology and know-how are required in the manufacture of high horsepower outboard motors. (Strang, Tr. 457.) Efficiency in fuel consumption, increased weight of larger engines and manufacturing techniques such as die casting, require greater technical innovation and development in manufacturing high horsepower outboard motors. (Alexander, Tr. 848-50.) Features such as jet prop exhaust and capacitor discharge ignition, which are important on larger outboards, were developed and adopted by Mercury, OMC and Chrysler to make their products more saleable. (Strang, Tr. 431; Alexander, Tr. 836-38, 840.) OMC, Mercury and Chrysler have competed in-

tensely in offering such product features. (Strang, Tr. 432-33, 450.)[8]

106. Many of the component parts of an outboard motor are die cast. (CX 112 [Alexander] Z-18.) Yamaha motorcycles have been die cast. However, since motorcycles do not use propellers or gear cases, Mercury's know-how in die casting these, could benefit Yamaha. (Alexander, Tr. 841.)

107. Aluminum castings used in outboard motors are frequently made through high pressure die casting, the main system used in the United States. A high pressure die casting machine contains a metal mold into which molten aluminum is injected at a pressure of 3,000 to 4,000 pounds per square inch. It is chilled in the water-cooled die, the die is then opened and the casting removed. (CX 112 [Alexander] Z-18; Strang, Tr. 413.) High pressure die casting techniques and processes have been well known in the United States for many years. (Strang, Tr. 414.) In 1972, there were many high pressure die casting vendors in the United States. (Strang, Tr. 414-15.)

108. In low pressure die casting, molten aluminum is inhaled into a die by a ceramic straw. After a few seconds to solidify, the vacuum creating the inhalation is turned off and the die is opened. Although low pressure die casting is a slower process, it produces a high quality casting which can be heat treated for high strengths during the casting

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[8] The record does not contain figures as to the amount spent by OMC, Mercury or Chrysler on research and development of their respective outboard motor lines. From 1966 to 1975, OMC's research and development budget increased from $8.3 million to an estimated $20.7 million. These figures, however, reflect research and development expenditures for OMC's entire line of products, which includes lawn mowers, snowmobiles and other durable goods. (BX 12FF, 1200, 12PP.)

process. (CX 112 [Alexander] Z-19, 112Z-20; Strang, Tr. 413-14.)

109. Jet prop exhaust, or "through-the-hub" exhaust, refers to the piping of the exhaust from the engine out ing the exhaust down through a snout behind and above the ing the exhaust down through a snout and above the propeller, which is the conventional way to put exhaust into the water. Jet prop results in better silencing and reducing the drag of the lower unit through the water by not forcing the water to close in behind the propeller hub, but rather by filling what would otherwise be a low pressure area downstream of the propeller exhaust. This results in slightly higher top speed and improved fuel economy because of the slight drag reduction. (CX 112 [Anderegg] Z-2, 112Z-3.)

110. The real advantage of the through-the-hub exhaust system appears on outboards that are capable of running a boat at higher speeds. (Strang, Tr. 404.) Where speed is important, it is desirable to eliminate the drag caused by propeller hub vortex. On small engines which run more slowly, it is not as important, and since it is more costly, there is a trade-off between a selling feature and the cost of the selling feature. (Strang, Tr. 523-24.)

111. Jet prop exhaust tends to be used in high horsepower outboard motors because it is more advantageous on higher speed boats, those that run 25 and 30 miles an hour. It is perhaps less of an advantage on low speed boats. (CX 112 [Alexander] Z-6.)

112. The fundamentals of the whole jet prop exhaust system were explained in a now expired 1921 patent. (Strang, Tr. 401.) Mercury has incorporated this feature in all its outboard motors. (CX 112 [Alexander] Z-3 - 112Z-4.) OMC has incorporated jet prop exhaust on newly

developed or retooled models. OMC does not believe the added cost of this feature is warranted on some of its smaller engines. (Strang, Tr. 403-04; CX 112 [Alexander] Z-3, 112Z-4.) Neither Chrysler nor Eska have incorporated jet prop exhaust on their outboards. (Dillon, Tr. 316; Kascel, Tr. 614.) The Yamaha 50 h.p. outboard displayed at the 1972 Tokyo Boat Show did not have jet prop exhaust. (CX 107 O.)

113. Capacitor discharge ignition ("CDI") is a form of electronic ignition system wherein an electrical capacitor is charged and subsequently discharged through a pulse transformer to produce a very rapid voltage rise in the spark plug. CDI allows use of surface gap spark plugs which eliminates oil fouling or lead fouling of the spark plugs and prevents misfiring of the spark plugs. (CX 112 [Alexander] R.) CDI can be used in any internal combustion engine. (Strang. Tr. 408.)

114. CDI is important in the larger size outboard motor over 25 h.p. This is because the high horsepower engines work harder to produce power, the breaking effect of pressure is higher, and the danger of pre-ignition is higher. (CX 112 [Alexander] Y.)

115. In 1972, there were many companies offering CDI systems for sale. (Dillon, Tr. 318; Strang, Tr. 408.) Some CDI systems were displayed at the 1972 Tokyo Boat Show. (Strang, Tr. 408.)

116. In 1972, all OMC larger outboard motors (50 h.p. and above) had CDI. (Strang, Tr. 407.) OMC outboard motors below 50 h.p. did not have CDI for several reasons: (1) some were older models which had not been updated, in part because CDI is not as critical to a small engine as it is to a large one; the small engines are not as prone to pre-ignition damage as large engines; (2) the cost of CDI

ignition is higher than inductive ignition; therefore, on the small engines, where cost is a greater factor, OMC chose to remain with the inductive style ignition system. (Strang, Tr. 407-08.)

117. Prior to the joint venture, Yamaha did not have CDI in its outboard motors. In upgrading the quality of the outboards to be produced by Sanshin, Mercury and Yamaha agreed that Yamaha would procure a CDI system from Japanese ignition system makers who could provide the CDI system in Japan. Mercury's first approach was to test, evaluate and qualify the Japanese ignition systems provided by Yamaha. As a second approach, Mercury and Yamaha discussed the possibility of Mercury supplying its own CDI system to Yamaha both for Sanshin-produced outboard motors as well as Yamaha motorcycles. (CX 112 [Alexander] W; CX 18D.)

118. In 1972, there were no significant patents relating to lower units of outboard motors. (Strang, Tr. 411.) A great deal of information relating to lower unit technology is available free of charge from United States Government sources as well as private institutes. (Strang, Tr. 411, 520-21.)

119. High horsepower outboards must be produced on a separate assembly line from low h.p. outboards. Since outboard motors over 25 or 40 h.p. are bolted onto the boat, the assembly lines for these motors must be able to handle an engine which is bolted in place. Large outboard motors also require more vertical space on the conveyors, larger test tanks and hoists or other equipment to move these heavier engines within the factory. (Strang, Tr. 392-94.)

120. OMC prices of high horsepower outboard motors are not affected by prices set for low horsepower motors.

(Strang, Tr. 397.) The President of OMC testified on this subject (Strang, Tr. 537):

> Q. What competitors' prices have you seen, Mr. Strang?
>
> A. We normally look at Chrysler's Mercury's, and this year, unfortunately, Mariner's prices came too late for us to compare.

121. Since at least 1968, the majority of dollar growth in the outboard motor industry has been in the high horsepower market. (BX 12P; Alexander, Tr. 838.) Although fewer high horsepower units are sold, the profit per unit increases with high horsepower outboards. (Strang, Tr. 425-26; Anderegg, Tr. 795.) Outboards of 45 h.p. and higher wear out much faster than lower horsepower engines, since they are often used in salt water, and at full throttle. (BX 12Q.) They therefore have to be replaced more often.

122. In 1972, outboard motors 20 h.p. and over accounted for $126,766,453 or over 78% of OMC's $160,967,371 total domestic outboard "factory value." (CX 93D, 93E.) In 1972, $26,149,000 or over 83% of Chrysler's $31,407,000 total sales were attributable to 20 h.p. and over outboard motors. (CX 94B.) During the same year, $52,840,000 or over 80% of Mercury's $65,686,000 total sales were attributable to 20 h.p. and over outboard motors. (CX 92B.)

123. OMC and Mercury sell all outboard motors manufactured by them exclusively through marine dealers. (Strang, Tr. 423; Kascel, Tr. 611.) With the exception of a comparatively few 35 to 55 h.p. private label outboards, Chrysler sells the high horsepower outboards manufactured by it through marine dealers. (CX 94D, 94E; Dillon, Tr. 290-91, 308, 310.)

124. Sales of high horsepower outboard engines to consumers is a more complex business and requires more skill and service than sales of low horsepower outboards and are therefore handled through marine dealers. (BX 24 [Bradley], pp. 12-13.) The "Andresen Report" in analyzing the distribution channel of high horsepower outboards stated: "Because of their need for skilled service and their large size, higher horsepower motors will probably continue to be distributed through marine dealers." (BX 12Q.)

125. As of 1969, there were an estimated 11,000 retail marine dealers in the United States. Of these, 91% were said to carry one or more lines of outboard motors in their product inventory. (CX 90Z-19.) The other 9% carried boats and accessories but no outboard motors. In 1971, Mercury sold outboard motors through approximately 2,500 to 3,000 marine dealers. (Anderegg, Tr. 768.) In 1972, OMC sold outboard motors through approximately 5,000 marine dealers, with 90% of the dealers handling only OMC's Johnson or Evinrude brand outboards. (Strang, Tr. 336, 532.)

126. Marine dealers feel they need a full line of outboard motors which includes both low and high horsepower models in order to offer the widest possible range of choice to potential customers. (Strang, Tr. 428; Anderegg, Tr. 795.) Although this full line can be obtained by carrying two brands (Strang, Tr. 505-06), it is difficult to deal in more than one brand. (Eguchi, Tr. 696.)

127. Marine dealer contracts for outboard motors are generally renewable on an annual basis. (Strang, Tr. 429; Anderegg, Tr. 779.) There is a continual dealer turnover, and OMC, Mercury and Chrysler compete vigorously for new dealers. (Strang, Tr. 432-33; Anderegg, Tr. 798.)

VI. Brunswick and the Joint Venture

A. Brunswick's Objectives

128. Mercury's share of the outboard motor market reached a plateau between 1965 and 1970 after which only minor fluctuations in market share occurred. (Finding 76; Anderegg, Tr. 784.) In 1970, Mercury began planning and discussion of a second line of outboard motors which it hoped would be the means whereby it could increase its market share. (Anderegg, Tr. 769-70; CX 13A.) Sometime in 1970 or early 1971 the decision was made to proceed with this second line of outboard motors. (Anderegg, Tr. 188.)

129. The basic reason that Mercury decided on a second brand was that Mercury hoped that production of a second brand would provide an opportunity to broaden its dealer base by increasing the number of marine dealers selling Mercury products and thereby increase its earnings. (Anderegg, Tr. 770.) With a second line, Mercury could supply dealers located next door to existing Mercury dealers, and thereby increase the number of dealers it sells to. (Anderegg, Tr. 770.) As of 1972, many voids existed in the marine dealership network and a new line could help to fill such voids. (Anderegg, Tr. 245; CX 8E.)

130. When formulating plans for a second line, Mercury also felt this line might be used as a vehicle by which Mercury could enter some markets in which it was not then selling, such as private labeling for mass merchandisers or discount stores. (Anderegg, Tr. 794; CX 7C, 8E, 13A, 17.) Mr. Anderegg and Mr. Reichert, the President and Chairman of Mariner, respectively, believed the domestic United States market in 1972 could support a new major brand of outboard motors which initially could be

sold through camper retailers, sporting goods stores, fishing and tackle outlets, camping outlets and fishing outlets. (Anderegg, Tr. 239; CX 7D, 8D; Brunswick Admissions, No. 6, p. 6.)[9]

131. In addition, Mr. Reichert, who is also President of the Mercury Division of Brunswick, summarized the "compelling reasons why new entry . . . should be successful" (CX 8A):

> From both a "defensive" and "offensive" viewpoint, it is obvious that we (Mercury) need new, simple, low cost, low horsepower offerings. So, too, do all of the other U.S. marine manufacturers. Everyone is vulnerable and using the approach of market segmentation any new entry will start in the low horsepower area. It is not unlike the automotive industry and the price which they paid to foreign firms for abandoning the low price, compact market. We can expect a similar foreign challenge—with or without us. Add to this the global opportunities for low horsepower engines resulting from less availability and higher cost for fuel, as well as different usage of the product.

132. Mercury's second line of outboard motors could be used as a means of meeting already existing competition as well as foreclosing entry by foreign outboard motor manufacturers in the low horsepower market (CX 2A):

> Our [Mercury's] marketing people can use a second line of engines competively against Johnson and Evinrude. A low-priced line strong in the low horsepower area could additionally compete with small engines being produced not only in Japan but in Italy, Yugoslavia and Sweden as well. Traditionally, new-

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[9] The economic outlook subsequently changed and the second line "Mariner" could not, from a cost standpoint, be sold through private labelers and mass merchandisers. (CX 108H-108I.) See Finding 147.

comers start with small engines and move up in horsepower and it benefits us to make it harder for these newcomers to prosper.

B. Joint Venture as Alternative to Additional Production Facilities

133. When the decision was made for Mercury to have a second line, production facilities were being utilized to the fullest and large amounts of capital were being put in to expand the existing capability of Mercury, so it was not practical to add a second line production on top of the manufacturing capability of Mercury itself. (Anderegg, Tr. 771; CX 71D; Finding 71.)

134. The record contains little direct evidence going to the issue of the feasibility of Mercury building new production facilities to provide its projected second line of outboard motors. In February 1973, a Mercury "MerCruiser Plant Justification" study proposed construction of a new plant for manufacturing and distributing all its inboard marine engines to be completed by 1977 at a total project cost of approximately $25 million. (CX 71B, 71F, 71H.) Completion of this new plant would "release a portion of our vital parts making capacity for the production of 50 plus horsepower outboards . . . ." (CX 71E.) The record does not reflect if, or how much, this transfer of production capacity would alleviate Mercury's inability to provide all outboard motor needs; nor is it possible to determine if similar costs and time would be incurred in building a new outboard motor production facility.

135. Current plans to prepare Mercury plants to be in a position to provide both the Mercury and Mariner lines of outboard motors by 1979 or 1980 suggest that within five years Mercury's production capacity can be increased to handle the second line. (CX 81A, 82B -82C, 82G.) In

the event the joint venture terminates, the only source being considered to provide the Mariner line is Mercury. (Anderegg, Tr. 792; CX 82C.) Mercury manufacturing has been instructed to plan for the production of both Mercury and Mariner products should the joint venture end. (Anderegg, Tr. 792.) The 1975 objectives prepared by Mariner's President states that by the end of 1979 it is "not only desirable but absolutely essential that we be positioned to source the entire Mariner line from Mercury plants . . . ." (CX 81A.)

C. Selection of Yamaha as Joint Venture Partner

136. The search for a source for Mercury's second line of outboard motors began in late 1971. (Anderegg, Tr. 771-72.) In describing this search, Mr. Anderegg testified:

> We went to look at companies that were in the outboard business and we looked primarily in Japan. We visited Japan and talked to several companies that were then building outboards.
>
> They were in the business, they had two-cycle technology. And they might be logical partners for Mercury and become the source of this product. (Tr. 771; see also CX 5A, 7A.)

137. Mercury expected that its joint venture partner would put its existing outboard business into the joint venture. (CX 5A.)

138. Mercury initiated discussions with Yamaha regarding a possible joint venture in 1971. (CX 7C, 79C; Stipulation, Tr. 678.) Yamaha at this time had strong distribution capabilities for outboard motors in some parts of the world (CX 9D) and, in 1972, had more experience in outboard motor engineering and manufacturing than any other Japanese outboard motor manufacturer. (Yamaha

Admissions, ¶ 48.) At the investigational hearings, Mercury's President stated that Yamaha was the strongest joint venture partner among possible joint venture partners looked at by Mercury. (Brunswick Admissions, pp. 12-13.)

139. Mercury favored Yamaha as a joint venture partner because of its technical competence and the broad base it could provide from which to launch a second line of outboard motors. (CX 9C, 13B.) The new "Mariner" product produced by such a joint venture also "would benefit from the backing of both of our well-known names in the marine field. It would not be like a new company, unknown in the industry, trying to introduce a fourth major outboard line . . . ." (CX 9C.)

140. Yamaha and Brunswick each brought to the joint venture assistance in and guarantees for raising funds. (CX 1 0, 79D.)

141. In 1972, Mercury executives believed Mercury could also benefit technically from a joint venture with Yamaha. (Alexander, Tr. 829-30.) Mr. Reichert, Mercury's President, recognized this anticipated technological benefit during the investigational hearings when he stated:

> They [Yamaha] had technology that came from the motorcycle business. You may or may not know Yamaha motorcycle is a two-cycle engine so they had engine technology from the two-cycle from the motorcycle business which we felt was particularly applicable to the lower or smaller horsepower, if you will, from, oh, 25 horsepower down kind of thing." (Brunswick Admissions, p. 12.)

142. Some technology involved in manufacturing the powerheads in motorcycles can be applied to the manufacturing of powerheads for outboard motors. (Yamaha Ad-

missions, ¶ 49.) OMC frequently purchases motorcycles of various makes and models, disassembles and examines them in order to study their manufacturing and design techniques for anything that might be applicable to outboard motors. When Mr. Strang was at Mercury, Mercury also purchased motorcycles for the same purpose. (Strang, Tr. 373.)

143. Loop-scavenged engine design is an example of the application of motorcycle engine design to outboard motor design. Outboard motors had traditionally been cross-scavenged. When OMC wanted to produce a loop-scavenged outboard motor, it obtained a good general picture of this type of engine design from motorcycles. (Strang, Tr. 374.) In the loop-scavenged engine in its most basic form, the cylinder has essentially three parts. The fresh charge enters the cylinder in two streams which are directed and rise within the cylinder to a focal point, then reverse over the top of the cylinder and go out through the exhaust port, forming a loop, hence the name "loop-scavenged." "Since the directed ports control the entering airstream, the piston doesn't need a deflector on top of it and can be flat or slightly crowned." (Strang, Tr. 483-84.)

144. In January 1973, after the joint venture agreement was entered and in furtherance of the exchange of technical information between Yamaha and Mercury, Mr. Alexander took two top Mercury engineers to tour the Yamaha plants. Mercury was interested in many things that Yamaha was doing with the motorcycle engine that might be applicable to future outboard motors, such as chrome plating technology, whereby chromium is plated directly on an aluminum cylinder bore which eliminates the need for a cast iron cylinder liner. This process not

only saves weight but perhaps even costs less in the long run. It improves the cooling of the piston because it eliminates the surrounding layer of cast iron the piston has to cool through to get to the waterjet. (Alexander, Tr. 855.)

145. Mercury has recently examined Yamaha's piston ring motorcycle technology which maintains a seal and prevents the piston from overheating. (Alexander, Tr. 855.) Overheating has been a problem for Mercury in its high horsepower engines. Mercury is presently developmentally testing a Yamaha-styled piston ring to solve its piston heating problems in the Mercury 175 h.p. outboard motor. (Alexander, Tr. 855-56.)

146. In 1971, Mercury's then President, Mr. Abernathy, believed a joint venture with Yamaha also would move Mercury rapidly from a weak position to a strong position in the Japanese marine market. (CX 2A.)

D. *Delayed Entry by Joint Venture*

147. In early 1972, Mercury hoped to start producing a second line of outboards through the proposed joint venture in about one year. (CX 8E.) In July 1972, Mercury planned to start marketing Mariner outboards in the United States by the start of calendar year 1974 (CX 16A-16B), and to start private label sales by the start of calendar year 1975. (CX 16B.) During 1972 and 1973, spiraling inflation in Japan and the weakening of the dollar in relation to the yen eliminated the cost advantage of manufacturing in Japan and prevented entry of Mariner outboards into the United States market unless they were to be sold at a loss. (BX 1H.) In addition, the top of the Mariner line was a 55 h.p. outboard and Mariner thought that they could not successfully recruit a dealer organization without a larger outboard. (Anderegg, Tr. 776.)

148. In 1976, Mariner was able to get from Mercury an 85 h.p. model with the prospect of higher horsepower models to come. (Anderegg, Tr. 776.) Mariner had franchised 51 marine dealers, in an 11-state area in the north central part of the United States, and finally introduced the Mariner line in September 1976. (Anderegg, Tr. 774.) Mariner planned for a network of 250 to 300 dealers by the end of 1977. (BX 25Z-70.) Mariner's line includes outboards of 2, 3.5, 5, 8, 15, 20, 28, 60, and 85 h.p. (BX 25Z-30.)

149. Mariner decided to come into the United States market as the fifth major brand, alongside Johnson, Evinrude, Mercury and Chrysler. (Anderegg, Tr. 777.) For this reason, Mariner did not want its line in the marine dealer's shop as a second line to another brand. (CX 108T.) The Mariner line of outboards was intended to compete to some extent with the Mercury line, although the breadth of the line would not be as great. (CX 8B.) Mariner hoped to form a network of exclusive marine dealers in the United States "by switching competitive dealers (except Mercury) and developing new marine dealers." (CX 108S.) None of the present 51 Mariner dealers switched from another manufacturer. (Anderegg, Tr. 813.)

150. Mariner outboards have a retail price 5% to 8% lower than comparative outboards sold by OMC, Mercury and Chrysler. (BX 25Z-78; BX 25B.)

VII. Yamaha's Interest in United States Outboard Motor Market

151. In 1964, a director of Yamaha visited the United States to view the market situation for outboard motors. Yamaha Admissions, ¶ 75.) Prior to the joint venture, Yamaha twice exported outboard motors for sale in the United States. It first attempted to sell its outboard

motors through YIC in 1968. In 1971 and 1972, Yamaha sold five hundred 1.5 h.p. outboard motors to Sears for private label sale in the United States. (Eguchi, Tr. 693.)

A. Yamaha's 1968 Entry

152. In 1968, YIC prepared for Yamaha an outboard engine market analysis for the United States. (CX 67A-67C.) The report studied geographical areas in the United States in which Yamaha might be able to gain market share. (CX 67B.)

153. In a news release dated March 5, 1968, YIC announced the introduction of Yamaha outboard motors for sale in the United States through YIC. (CX 61.) Yamaha planned to market their outboard motors through marine outlets and to some extent, through Yamaha motorcycle dealers. (CX 61.)

154. In 1968, YIC imported from Yamaha 1700 low horsepower engines (3.5 h.p., 5 h.p. and 7.5 h.p.) and attempted to sell them in this country. (CX 68.) About 900 of these motors were delivered to dealers and 800 returned to Yamaha unsold. As of January 1969, retail sales to customers amounted to about 20% to 30% of the dealers' stock. "Most of them are still on the dealer's floor, especially the motorcycle dealers are carrying most of their units and they are requesting Yamaha to buy back those units." (BX 5A.)

155. Among the reasons that this 1968 attempt failed were that the United States market preferred water-cooled and two-cylinder engines, and Yamaha motors were air-cooled and single engine. (Eguchi, Tr. 695; see CX 68 for other deficiencies.)

B. Yamaha Sales to Sears

156. In 1971-1972, Yamaha sold about five hundred 1.5 h.p. outboard motors to Sears under the "Sears" label for marketing in the United States. (Eguchi, Tr. 693; BX 24 [Bradley], p. 8.) Sears purchased only the 1.5 h.p. motor because the other outboards offered by Yamaha were too expensive. (BX 24 [Bradley], pp. 30-31.)

157. Sears did not purchase from Yamaha after 1972 because the Yamaha outboards were not selling well enough. (BX 24 [Bradley], p. 36.) The reason for the failure to sell was that the outboards were too expensive (BX 24 [Bradley], p. 37) and were better than they needed to be for the Sears market. (BX 24 [Bradley], pp. 17-18.)

158. Sears then got a 1.2 h.p. outboard motor from Tanaka. (BX 24 [Bradley], p. 37.) It is a slightly lighter, less expensive outboard than the Yamaha, but the quality is fairly close. (BX 24 [Bradley], p. 46.)

C. Yamaha's Plans to Enter the United States Markets

159. In June 1969, Yamaha developed a plan for a 25 h.p. outboard motor because of a request by Sears, Roebuck & Co. and because of the need for a motor big enough for water skiing. It was to go into production in May 1971. (CX 24D.)

160. In 1970, Yamaha planned for the development of a 40 h.p. outboard motor. (CX 25, 26.) The plan stated, "in the export sector, this engine is a part of the plan to set up a distribution chain featuring a line of merchandise covering 1.5 to 40 horsepower." (CX 26D.) Yamaha compared its proposed 40 h.p. model with the similar OMC, Chrysler and Mercury models. (CX 26G.)

161. A Yamaha development plan in November 1971 for a 6 h.p. outboard motor stated that: ". . . this is the model which can be exported to the United States as the major model; it can also be used to expand the European market, emphasizing Yamaha characteristics in performance and in quality." (CX 20D.) This horsepower model was scheduled to go into production in March 1973. (CX 20D.) "As an export item into the United States, this is a new model." (CX 20D.) Features to be included in this 6 h.p. model included a water-cooled, two-cylinder engine, separate gas tank, water pollution control, noise and vibration counter measures and CDI. (CX 20D-20E.) Yamaha planned to "hasten to develop this as a model which can advance into the American market. . . ." (CX 20G.) The Yamaha plan further stated, ". . . this model is to be designed from scrap both in the basic specification and in graphic design, and is to become a model which can squarely face the competitive models by the three majors of outboards (OMC, Mercury, Chrys.). Additionally, we must incorporate characteristically Yamaha traits of performance and quality." (CX 20G.)

162. In November 1971, Yamaha prepared a development plan for a 10 h.p. outboard motor to be exported for sale to the United States and Europe. (CX 22A - 22M.) The Yamaha 10 h.p. outboard motor was scheduled to go into production in January 1973. (CX 22D.) That plan stated, "as a Yamaha merchandise mainstay in the United States, both in performance and quality construction, this engine should be suitable to the United States . . . [i]n terms of the U.S. market, this is a new edition." (CX 22D.) Features of the 10 h.p. outboard motor include a water-cooled, two-cylinder engine, separate fuel tanks, water pollution measures, and CDI. (CX 22D - 22E.) Yamaha showed great interest in the United States market. "De-

velopment of a 9.5 h.p. outboard is a must when we think in terms of expansion into the U.S. market. This will become a major drawing card." (CX 22G.) "In order to plan for Yamaha outboard market expansion and increase in sales, we have to plan for expansion into the U.S. market which is the place for outboards. In the U.S., the most popular outboard models are in the 9.5 h.p. class, occupying about 22% of the total demand." (CX 22F.) "To advance into the market built by the world's three largest makers, namely OMC, Mercury and Chrysler, and to squarely compete with their 9.5 h.p. class products, our product will have to have advance merchandising characteristics (such as performance, quality and dependability). . . ." (CX 22G.) The plan recognized, however, that this competition would cause severe problems in terms of cost: "'[A]t the same time we are placed in an ever increasingly severe situation in terms of cost-competitiveness as well." (CX 22G.)

163. In July 1971, Yamaha completed a development plan for a 45 h.p. outboard motor. (CX 27, 28.) The plan recommended intended production of the 45 h.p. model in October 1972 for export to Europe and contemplated future export to the U.S. (CX 28B.) The report stated, "it seems that there is an urgent need for development of a high horsepower model of 40-45 h.p. category as a major drawing card among the Yamaha outboards, after the completion of the 25 h.p. P 450 project . . . also, as a drawing card in our advance into the export (overseas) trade." (CX 28D.) "In the United States, the 1970 outboard motor sales statistics broken down according to horsepower rates indicates that over 30% of the total sales was in the 45 h.p. or higher category. So, the 45 h.p. machine occupies considerable share." (CX 28D, 28G.)

VIII. Yamaha's Capacity to Enter the United States Markets

164. In 1968, Yamaha offered four outboard motor models which were air-cooled, single-cylinder engines. (Eguchi, Tr. 667, 695.) After 1968, Yamaha developed two-cylinder, water-cooled outboard motors. (Eguchi, Tr. 702.) By 1971, Yamaha had developed six models up to 15 h.p., which included two-cylinder, water-cooled models; by 1972, Yamaha had developed eight models up to 25 h.p. (Yamaha Amended Ans., ¶ 2; CX 3.) By 1972, Yamaha had both water and air-cooled outboard motors which were manufactured by Sanshin. (Eguchi, Tr. 669-70.) In 1972, Sanshin manufactured all component parts of Yamaha brand outboard motors. (Eguchi, Tr. 672.)

165. Charles G. Strang, President of OMC, testified concerning the 25 h.p. outboard motor developed by Yamaha in 1971 (Tr. 346-50):

> Q. You testified that you knew that Yamaha was a strong competitor in Europe. When did you become aware that Yamaha was a strong competitor in Europe, Mr. Strang?
>
> A. I became very vigorously aware of it in the fall of 1971.
>
> Q. And what happened then?
>
> A. We have sales meetings in Europe every fall, which I attend, and we attended the sales meetings in October.
>
> The Witness: And it was brought to our attention by our distributors in Europe that Yamaha was making inroads in Europe.
>
> Q. Now, do you recall what Yamaha's marketing practices in Europe were that were mentioned at this meeting you attended in October or the late fall of 1971?
>
> . . .

A. These were sales meetings attended by our European distributors and one subject brought up was the activity of Yamaha in particular in Europe, and our distributors were reporting this to those of us from OMC headquarters.

And they were talking specifically of Yamaha's practices of varying the price to get the dealer, and being willing to go to what they termed any length to be able to establish a dual dealership with an OMC franchised dealer.

. . .

Q. Did you do anything in response to these field reports?

A. Yes. The reports were specifically aimed or vociferous, I should say, about a 25-horsepower engine that Yamaha had, and we decided to get ahold of one of those engines and find out about it, and through our Evinrude and Johnson Distributor in Japan, we were able to obtain one.

Q. This was a 25-horsepower Yamaha outboard motor?

A. Yes.

Q. Did you test it?

A. Yes.

Q. Where?

A. In our engineering facilities at Waukegan.

Q. Do you recall when?

A. It was sometime in the winter of '71, '72.

Q. Did you ever see this test report?

A. Yes.

Q. Did you ever see the engine torn down and disassembled?

A. Yes, I did.

Q. What were your conclusions from the test report and your personal observations?

A. An excellent engine, styled, shall we say, very closely after the Outboard Marine product and a very good performer in both speed and fuel economy.

Q. In your opinion, was that suitable for marketing in the US, then?

A. Yes.

Q. How did it compare with the Johnson, Evinrude and Mercury outboards of comparable horsepower, then?

A. Unfortunately, it out-performed both of them.

166. Mr. Strang went to the Tokyo Boat Show in the fall of 1972 and was surprised to see the emphasis on larger and better outboard motors. In a summary of his trip he reported (CX 107B - 107C):

> The thing that was new here at this show, was the entry of many of the top motorcycle makers and other well-known firms into the outboard business and in larger sizes.
>
> For instance, not too long ago, last fall, in fact, Yamaha, a big motorcycle maker, who is also the world's largest maker of pianos of all things, came forth with a new 25 horsepower outboard. As some of you know, we got a sample of that, and ran it, and found it to be a very fine engine capable of out-performing not only our own 25, but Mercury's, and being a topnotch, ultra-modern outboard - no cheap junky. Well, we, of course, have been concerned about that Yamaha 25, so you can imagine my feeling when I got to the show and found five other new 25 horsepower outboards on exhibit from such manufacturers as Kawasaki, the big motorcycle maker, Tohatsu, Suzuki, another of the big motorcycle makers, Yamato, and our friends at Yanmar showed a new 25 horsepower version of their rotary Wankel outboard.
>
> As I say, these are not second-rate economy machines, but they are top-notch, ultra-modern machines, and in those areas where we competed head-on, we find that they can come in with prices approximately 20% below ours, which gives a little idea of the way we have to go.

167. The 1972 OMC test report of the Yahama 25 h.p. outboard motor (CX 89) shows that the Yamaha 25 h.p. model was considerably superior in horsepower over the

entire operating range from 3,000 to 6,000 RPM to both the Mercury and OMC tested engines. (Strang, Tr. 354.) The test report also showed that with a light load, namely one man, the Yamaha 25 h.p. engine pushed a boat at roughly a mile and a half faster than an OMC engine. (Strang, Tr. 356.) The Yamaha engine also got much better gas mileage than the OMC engine, getting almost twice as many miles per gallon at 15 m.p.h. (CX 89D.)

168. Mercury tested the Yamaha 25 h.p. outboard motor, and in a report dated May 25, 1973, the Mercury engineer felt that the motor moved test boats as well as the competitive Mercury motor; that it resisted salt water corrosion well; that spark plug life was very good for a standard ignition system (it lacked a CDI); and that the manual rewind starter was simpler and better than the Mercury starter. However, the engineer reported, among other slighter defects, an aggravating problem with the Yamaha 25 was that it broke propeller shear pins, as many as three a day and that: "A Mercury owner would really appreciate his rubber clutch propeller if he would test drive a Yamaha for a few hours." (CX 42C-42H.)

169. Pursuant to the engineering agreement signed by Yamaha and Brunswick in November 1972, Yamaha agreed to send samples of outboard motors to Mercury for testing. (BX 21.) The general evaluation (excluding idle) by Mercury engineers of eight Yamaha engines (2, 3.5, 5, 8, 12, 15, 20 and 25 h.p.) in September 1973, rated three "good," three "fair," and two "poor." (CX 53.) This report was very critical of the idle of the motors. One Mercury engineer reported his first impression (CX 48):

> They perform quite well and would be as good as any other low feature engine on the market. They are easy to operate, responsive and surprisingly quiet. There is one great problem, however, with the 12, 15 and to some extent the 20 h.p. engines. The problem

> is extremely rough idle. While the engine does not seem to be missing, it shakes so badly it seems as though the engine and boat are both going to come unglued. . . . I don't feel we can sell the 12 or 15 h.p. engines until that condition is cured. We could live with the 20 h.p. but it could use some work also.

170. Yamaha had a 55 h.p. outboard motor at the 1972 Tokyo Boat Show. It was a prototype and was not made available for inspection as were other Yamaha outboards. It lacked through-the-hub (jet prop) exhaust. (Strang, Tr. 446-47.) At the 1973 Tokyo Boat Show, the Yamaha 55 h.p. still was not available for inspection. It now had through-the-hub exhaust. (Strang, Tr. 448.) Yamaha sold 109 of these outboard motors in Japan in 1973 and 585 in 1974. (CX 98A.) OMC tested this motor in 1974 and Mr. Strang testified that it was a "very nice engine, very good performer. . . ." (Strang, Tr. 449.) However, as soon as Mariner saw the costs of the motor they urged a cost reduction study since it "could not be sold competitively at a satisfactory profit." In 1974, Sanshin and Mariner conducted a cost study resulting in changes for reduction of costs on production of this motor, including the addition of an American-made starter motor and Mercury capacitor discharge ignition. (BX 17A-17B.)

171. Yamaha needed a 55 h.p. outboard motor to successfully come into the United States market in 1972. (Eguchi, Tr. 699.) Sanshin built the first models for sale by Mariner in mid-1974, but by that time costs has spiraled in Japan and Mariner thought they could not successfully recruit a marine dealer organization with a line that went up only to 55 h.p. Mariner got a 85 h.p. model from Mercury in 1976 and entered the United States market. (Anderegg, Tr. 776.)

172. The two-cycle technology expertise of Yamaha in snowmobiles and motorcycles would be an advantage to Yamaha in marketing outboard motors. (CX 76C; Strang,

Tr. 375-76.) A journeyman mechanic who is able to repair the powerhead unit of the Yamaha-manufactured motorcycle is also able to repair the powerhead unit of Yamaha-manufactured snowmobile. (Stipulation No. 2.) Dealers skilled in repairing two-cycle motorcycles could repair two-cycle outboards. (Strang, Tr. 372, 378; see Finding 181.)

173. In 1972, Yamaha was selling outboard motors throughout the world, with the exception of the United States. (CX 15B-15C.) It sold in Europe, Canada, South East Asia, Africa, the Middle East, Oceania (Australia and New Zealand) and in Central and South America. (CX 15B-15D; Eguchi, Tr. 664.) Europe, Canada, Australia and the Far East (principally Japan) constituted the most important foreign markets. (BX 12T.)

174. By 1972, Yamaha had about 70% of the Japanese outboard motor market. (CX 5B, 59A.)

175. During 1972, the horsepower range of outboard motors sold by Yamaha in Japan ranged from 2 through 25 h.p. (CX 111B.) In 1971, Yamaha exported over 25,000 outboard motors ranging in horsepower from 2 through 25 h.p. (CX 15A; Eguchi, Tr. 661.)

176. Yamaha-manufactured motorcycles were first marketed in the United States in 1959. By 1974, over 30 models of "Yamaha" motorcycles were being sold by YIC in the United States. (Stipulation No.2, #25, #27.) YIC developed a network of retail dealers in the United States for "Yamaha" motorcycles. (Yamaha Supplemental Admissions, p. 3, 6/18/76.) In 1974, approximately 20% of all motorcycles sold in the United States were "Yamaha" motorcycles distributed by YIC. (Stipulation No. 2, #28.)

177. Yamaha also manufactures snowmobiles, which were first sold by YIC in the United States in 1968. (Stipulation No. 2, #30.) By 1974, eleven or twelve models of

Yamaha brand snowmobiles were sold by YIC. (Stipulation No. 2, #32.)

178. "Yamaha" brand name recognition is important to Yamaha and YIC for the successful marketing of "Yamaha" products in the United States. (Stipulation No. 2, #23.) From 1964 to date, YIC has been able to gain name recognition in the United States for "Yamaha" brand products through consumer and trade advertising. (Stipulation No. 2, #24.)

179. In 1972, some "Yamaha" brand franchised dealers in the United States sold both "Yamaha" motorcycles and snowmobiles. (Stipulation No. 2, #33.)

180. In 1972, OMC sold both snowmobiles and outboard motors. Snowmobile and outboard motor dealerships are compatible in that both are two-cycle engines and use numerous common parts. The outboard motor dealer is in a good position to service both snowmobiles and outboard motors. A line of snowmobiles give a marine dealer a year-round business—he can sell snowmobiles in the winter and outboard motors in the summer. (Strang, Tr. 375.)

181. Motorcycle dealers are skilled in servicing two-cycle engines which are common to outboard motors and motorcycles. (Strang, Tr. 372.) Motorcycle dealers could provide a way for Yamaha to enter the United States market initially. (Strang, Tr. 372-73; CX 79J, 90Z-60, 108T.) Motorcycle dealers are not prime distributors of outboard motors, however, unless they are marine dealers, carrying boats and accessories as well as a full line of accessories. (Eguchi, Tr. 696-97; Strang, Tr. 373.) The main reason for this is that the sales seasons for motorcycles and outboard motors coincide (CX 90Z-61), whereas the season for snowmobiles is complementary to those products. (Strang, Tr. 375; Anderegg, Tr. 796.)

IX. *Yamaha and the Joint Venture*

A. *Yamaha's Position on the Edge of the Market*

182. Prior to the joint venture, Yamaha had a relatively simple, economical low horsepower line, suitable for salt water and used primarily for commercial fishing and transportation. In 1972, Yamaha's largest outboard motor was 25 h.p. (BX 1K; Eguchi, Tr. 669.) Many of the parts of the Yamaha outboards were stainless steel to prevent corrosion, since they were constructed for salt water use. (CX 42G.) Low horsepower outboards in the United States, by contrast, are used mostly on lakes, rivers and streams and rarely in salt water. (BX 3A, 12Q.) This is one of the reasons that the Yamaha low horsepower motors were too costly to compete in the United States market. (BX 24 [Bradley], pp. 36-37.)

183. The Yamaha brand of outboard motors sold in Japan and Europe were, in 1972, low horsepower motors, lacking the power and features which were common on outboard motors sold for pleasure boating in the United States. (Alexander, Tr. 834-35; BX 1K.)

184. Yamaha went into the European outboard market in 1968. (Eguchi, Tr. 660.) Because Europeans have less disposable income and smaller cars (for boat towing), and due to the cost of fuel, the European outboard motor market favors a lower horsepower engine. (Strang, Tr. 452.) Outboards of less than 25 h.p. comprise 75% of that market. (CX 15B). By 1972, Yamaha had 12% of the low horsepower market in Europe, and was second to OMC. (CX 15B.)

185. Yamaha's outboard motors suit the market in Japan, Southeast Asia, Africa, Oceania (New Zealand and Australia), and Central and South America. (CX 15B-15D.) These markets call for simple, less costly motors with few features which are used primarily for commercial fishing and transportation. (BX 20E.)

186. From its attempt to penetrate the United States outboard motor market in 1968, Yamaha learned the value of a full line and marine dealers in this market. (BX 8F, 8J.) Mr. Eguchi, Managing Director of Yamaha, testified on this subject (Tr. 695-96):

> Q. Can you tell me, sir, why it is that Yamaha Motor—well, Yamaha, as you have testified, selects dealers through which to sell its products rather than in some other way?
>
> A. Outboard motor market is pretty well established market already, and those products are handled by marine dealers, and unless you go to marine dealers you will have no access, practically, to the marine product customers.
>
> Q. Now, sir, you've testified that Yamaha had by 1972 increased its range of models to include a 25 horsepower model?
>
> A. Yes.
>
> Q. And you have testified that—and Yamaha has increased its horsepower models since then, has it not?
>
> A. We increased up to 55 since then.
>
> Q. Yes, sir.
>
> Now, based upon your experience, Mr. Eguchi, why is it that a company does that? Namely, expands its line of outboard motors. What's the business reason for that effort?
>
> A. When you try to be one of the top class outboard manufacturers, you have to have a full range of models, so naturally we want to develop more or bigger horsepower motors in our line.
>
> Q. What effect, if any, sir, in obtaining marine dealers for your product does having a broad line have?
>
> A. Every top-class outboard motor manufacturer has its own full line, and for the dealers, marine dealers, unless they have full line of the products they cannot operate successfully its marine business. And if you only have a certain limited models, the dealer has to go to somebody else to get the rest of the models in the lineup, and that is pretty difficult to divide the sources of the products by category.

187. Most consumers are conditioned to purchase outboard motors from marine dealers. (CX 90Z-61, 90Z-62.) They often buy outboard motors at the same time and place that they buy other hunting, boating and/or fishing gear. (CX 90Z-61.)

188. Motorcycle dealers, while able to repair two-cycle engines like most outboards, do not offer long-term promise for entry to the United States outboard markets. (CX 90Z-60-90Z-61.) The seasons for outboards and motorcycles coincide, and they both would compete for a dealer's floor space, inventory investment and merchandising. (CX 90Z-6, 90Z-46, 90Z-61.) Yamaha based its 1968 attempted United States market penetration on sales through 70 motorcycle dealers and 30 marine dealers. This attempt failed "especially" through the motorcycle dealers. (BX 5A.)

B. *Benefits to Yamaha from Joint Venture*

189. Yamaha believed that the joint venture was advantageous to it. Yamaha would receive the designing and manufacturing techniques for high performance outboard motors, especially large engines over 50 h.p. The increase in production would lead to production rationalization and total cost reduction. And, in addition, because of the joint venture, Yamaha would finally be in the United States outboard market, through not with the "Yamaha" brand. (BX 8B.)

190. The disadvantages considered by Yamaha in determining whether to attempt entry on its own included the lack of a full line, high costs, the need for a network of marine dealers, and the present inability to meet the particular needs of the market for power and performance. (BX 8F.)

191. Yamaha wanted to avoid the price and cost competition existing in the low horsepower outboard market in the United States. (BX 3D, 3E.) The high horsepower outboards, with higher prices and more accessories, generate higher profits. (BX 12CC.) Yamaha wanted to enter the high horsepower outboard market in the United States as a top class manufacturer. (Eguchi, Tr. 696.)

192. Yamaha regarded the joint venture as an alternative to entering the United States market under the Yamaha brand. Yamaha had determined that it would take much time to develop high horsepower outboard motors and the full line necessary to enter the market. Yamaha was not considering entering on its own in the near future and had no concrete plan to do so. (BX 8D-8E; Alexander, Tr. 856-58.)

193. After the unsuccessful attempts to enter the United States market in 1968 and 1971. Yamaha engineers continued their interest in developing outboard motors which would sell in the United States market. (BX 5B; CX 19-28.) The engineers had a plan to develop a line of pleasure-type outboards from 3 h.p. to 45 h.p. suitable for sale in the United States and Europe. (CX 5B.) In 1971, Yamaha engineers planned to redesign their 10 h.p. outboard motor to include features such as CDI and jet prop exhaust. (CX 22D-22E.) In 1975, Mariner engineers reported the history of this project:

> Yamaha designed and developed a 10 h.p. engine during the past several years but dropped it (after tooling partially completed) because of high manufacturing costs. This spring MIC [Mariner] Engineering made a study of the engine and set a tentative reduction of $50.00 in manufacturing costs. At MIC instigations, the program was started again with a thorough redesign of the engine in mind to produce both 10 h.p.

and 15 h.p. models and to reduce cost. At present, Japanese engineers are in our office doing the redesign work under MIC guidance. . . . (BX 17B.)

194. Mr. Charles F. Alexander, Jr., Mercury's Vice President in Charge of Engineering, testified about Yamaha's lack of readiness to enter the United States outboard motor market in 1972 and the benefits it obtained from the joint venture (Tr. 856-58):

Q. Mr. Alexander, with respect to the technology that Mercury transferred to Yamaha that you testified to involving the CDI and the jet prop and the rest of it, could you put a dollar value on what that information or technology is worth?

A. No, I don't think I could. But I know that it saved Yamaha a lot of time. I know that it brings them very rapidly up to the state of the art, and has to be worth an awful lot of money to them as a possible future manufacturer in this business.

I don't think we would sell it to any one, because it's worth too much.

Q. You are saying it is worth more than a million dollars?

A. Oh, of course.

Q. Would it be worth $25 million?

A. I can't put a value on it, but when you are in a business of hundreds of millions of dollars a year, and you give away the essential technical information that enables somebody else to get up to your state of the art, it has to be worth quite a bit.

Q. Speaking about the state of the art, what was Yamaha's posture with respect to the state of the art in 1972 with respect to outboard motors?

A. At the time they had a low-powered line of outboards, not particularly different from several others in the world. They had basically copied as best they could OMC models in the lower end of the horsepower range.

They certainly would not have been able to be a factor at that time in the U.S. market, because they did not have the product.

Q. Would you say that by virtue of this input of technology they have advanced their known state of the art by several years?

A. I am sure that they have saved a lot of time in getting up to date and being in a position to be competitive in this market.

Q. Could you give us, when you say "save time" could you measure that in either months or years or days

A. It is hard to do, because they did not have an outboard engineering organization that even understood the problems. If you said they would have had to first develop the organization and then the product line, I don't know.

It would have to take them at least two or three times as long as with our help, and we probably saved them some field disasters and some recalls, because when you try to plunge headlong into these things you sometimes make mistakes.

And then you have massive recalls which hurt the image as well as cost money.

195. Yamaha and Sanshin obtained valuable know-how from Mercury after the joint venture agreement. Mr. Alexander testified about this subject (Tr. 830-33):

Q. When was the first point in time that Mercury began exchanging technology with Yamaha after the execution of the joint venture agreement?

A. It was in January, 1973.

Q. What were the circumstances of that exchange?

A. We invited Yamaha engineering people to send representatives to Oshkosh, design engineering people, so that we could work closely with them on the design of certain new outboards that Sanshin would make that would be suitable for sale in the U.S. market, and

it would upgrade the line both in horsepower and in features to be more like the currently successful U.S. outboard companies.

Q. What kinds of information did you make available to these Yamaha engineers?

A. We decided that we could not simply mail them a bunch of drawings and patents, that we had to get them to come to Oshkosh so that we could teach them from Mercury drawings how to design these features into the new outboards.

So we rented space in the University of Wisconsin, Oshkosh, space for them to live, space for them to work. And we assigned people full-time to work with them.

I, personally, participated in this and they were there for several months, four, five, six months, with drawing boards that we moved into this dormitory area, which was part of the university.

We brought our drawings out and we had their designers at the board, because they had to make Japanese notations in the drawings.

They had to make the drawings so they could use them in Japan, and we knew we could not do that. We wanted to be sure that the information from our drawings was properly put on their drawings to adapt it to their engines, their powerhead part.

Our contribution was primarily below the powerhead. The Yamaha people know very well how to make an engine, although they did not know everything that was required of a two-cycle engine to be an outboard.

For example, they did not have the engines idling slowly enough and consistently enough. But basically they had good engine technology.

What we were contributing was the rest of the outboard motor, which is, perhaps, half of the package, the propeller and the gear case, the undercarriage, the rubber mounts, to make the engine push the boat properly.

So we worked with them for several months, as I said, in the design of new outboard motors which would eventually get into production in Sanshin for Mariner and also for Yamaha.

Q. How many engineers came from Japan? Do you have any idea?

A. I think there were six or eight; something like that.

Q. These drawings and this know-how that you exchanged with Yamaha, is that information generally public? Is it made available to the trade or anything?

A. No, not at all.

Q. That is proprietary information?

A. Sure. It is all the know-how that goes into our outboard motors, some of which is patented, but most of which is simply trade secrets, know-how, little things you do to make things work properly.

C. *Future Unilateral Entry by Yamaha*

196. The joint venture is unlikely to last beyond the ten-year term specified in the agreement. Yamaha's management has stated publicly that the reason Yamaha entered the venture was to benefit from Mercury technology and know-how, which will be gained during the ten-year period. Development of high horsepower models by Sanshin has not been practical due to high cost of development and tooling, and Mariner has obtained these models from Mercury. This is a signal to Yamaha that Mariner considers the joint venture a short-term arrangement. Once the notice of termination is given, three years prior to the ten-year term, it is likely that the joint venture will not continue past the notice date and dissolution will take place at that time. (BX 1 O-1P.)

197. The joint venture agreement has facilitated future (post joint venture) unilateral entry by Yamaha into the United States outboard motor markets. Yamaha and Sanshin have received valuable technology and know-how from

Mercury. (Alexander, Tr. 856-58.) This exchange has saved Yamaha much time in developing high horsepower outboards and a full line necessary to enter the United States markets. (BX 8E; Alexander, Tr. 856-58.)

198. Except for Mariner's 85 h.p. outboard which is made by Mercury, Mariner outboards made by Sanshin are identical to Yamaha outboards except for color and decal. (Respondents' Proposed Finding III(9)(b)(i); Complaint Counsel's Reply Brief, p. 21.) The 51 Mariner dealers franchised so far have signed a one-year franchise. (Anderegg, Tr. 779.) If the joint venture ends, they may be targets to become Yamaha dealers in the future if Yamaha enters the United States markets. (Anderegg, Tr. 798.)

199. The structure of the joint venture may end upon notice to terminate from either party in May 1979: ". . . it is likely that if such notice is given, there would be an agreement not to continue the joint venture subsequent to 1979 and an orderly dissolution would take place at that time." (CX 108 O.) Mercury manufacturing facilities have been instructed to include in its planning the production of the full requirements of both Mercury and Mariner by that time. (Anderegg, Tr. 792; CX 81A, 84A.)

X. *Yamaha as a Perceived Potential Entrant*

200. In 1972, Mr. Strang, the President of OMC, visited the 1972 Tokyo Boat Show and reported that Yamaha was a potential entrant into the United States outboard motor markets. (CX 107B-107C.) (See Finding 166.)

201. Mr. Strang's notes at the 1972 Tokyo Boat Show indicated that Tohatsu was a potential entrant into the United States outboard motor markets (CX 107H):

> *Tohatsu* . . . . They, too, as I said showed a new 25 horsepower engine and 23½ cubic inches, which tops a line of 4 horsepower, 5, 8, 9.8, 12 and 18 horsepower

engines. It follows the U.S. pattern very closely even to marketing their own outboard oil, their own remote controls and everything that the U.S. outboard companies do. And, as you can see, their display is completely modern and the equivalent of anything that Chrysler, Mercury or ourselves might have. One thing significant was pointed out to me here by Mr. Yuano of our distributors, and that was that all of the literature at this show covering the outboards was printed in English for the first time in this particular show, presumably as part of their preparations for launching a world-wide sales assault.

202. Mr. Strang's notes of the 1972 Tokyo Boat Show indicate that Kawasaki was a potential entrant into the United States outboard motor markets. (CX 107I, 107K):

Kawasaki . . . . This, too, was a shaker. . . .

. . .

Now they introduced two new molels. 15 and 25 horsepower engines at roughly 16 and 25 cubic inches each, and here they are, the black engines up there. It was interesting. While most of the Japanese makers have chosen to, shall we say, duplicate the OMC engines both in design and styling, Kawasaki, instead, chose to follow the Mercury line of styling, and as you can see, they have even taken the plack [*sic*] paint, although they have highlighted it with a slash of orange on the side. The engines here—there are 2, 15-horse engines here and 2, 25-horse engines shown. These were so new that they didn't even have prices on them yet, but this is the start of their new line—they've retained their old line of 2½ horsepower, 5 horsepower and 7 horsepower engines, topping it with these two new models. You can see there is trouble coming there.

203. Mr. Strang's notes of the 1972 Tokyo Boat Show indicate that Yamato was a potential entrant into the United States outboard motor markets (CX 107H-107I):

Yamato . . . .

More important to us at this show was the engine just to the left of the racing engine, and that is Yamato's new 25 horsepower engine, which was indeed again a very modern, well developed, well styled and very professional looking 25 horse twin. Perhaps more importantly, behind the 25 on the far side of those boats, you can just see the power heads of their other new entry in the field. It is a 3 cylinder, 55 horsepower engine, very similar in appearance to our own 3 cylinder engine, and very similar in design. They did a good job on it, the best that I could see, and were kind enough to take the engine cover off and I could get a good look at it. I was so impressed with both of these engines that I asked our people to get one of each for us for engineering tests. These people are relatively small, but they have a lot of know-how in the outboard field from their racing background. There is no question that they could be a real problem if they really get into the marketing aspects of this thing.

204. Mr. Strang's notes of the 1972 Tokyo Boat Show described Jayanese competition as having "wiped out the rest of the world's motorcycle industry" and concluded (CX 107V-107W):

Needless to say, we don't want this to happen to OMC and we have to take steps to see that it doesn't—and it's going to be no small problem between the government intervention over there, to assist in the growth of this export market, and between the labor situation which they have there, the rates that they pay their workers and the productivity of the workers. Yamaha, for instance, pays its workers a flat monthly salary with no incentive pay and feel that what they call their nationalistic drive takes care of the incentive. That's very hard to compete against, and the government thing makes it almost impossible. So it behooves us, in our plan of work, and we should keep it in mind at the rest of this meeting and all of

our future planning meetings that we have to keep all our product development ready for the Japanese invasion. The only way we are going to be able to fight it, it would appear, is by keeping ahead of them in products and by keeping ahead of them in manufacturing; hopefully, by keeping a step ahead of them in marketing techniques. I know this is not a very pleasant picture that I've painted before we get into this thing, but let's be blunt about it. We have to take steps to stay alive—and—with that grim warning—let's go on to the rest of the agenda.

205. OMC's initial reaction to the 1972 Tokyo Boat Show and its test report on the Yamaha 25 h.p. outboard motor was to improve the quality of its own 25 h.p. outboard motor. Mr. Strang, President of OMC, testified on this subject (Tr. 361-64):

Q. What was the reaction of OMC to the test report and to your report of the Tokyo Boat Show?

A. The initial reaction was that we obviously needed a better engine in the 25-horsepower range to compete with the Yamaha that was then in existence. And we took steps to initiate the engineering and manufacturing of a better engine.

Q. What exactly did you do to upgrade the OMC 25 horsepower?

A. We started out on the premise that we would merely increase the bore a little bit and tune it a little more highly. As time wore on, we made sizeable changes to the engine and it eventually wound up as virtually a new engine of larger piston displacement.

Q. After you had accomplished this upgrading of the OMC 25 horsepower, was its performance comparable to that of the Yamaha outboard you had tested?

A. Yes.

. . .

Q. Did you improve the OMC outboard for sale in the US?

A. Essentially, we tried to sell the same engines all over the world, so, yes.

Q. So is the improved OMC 25 horsepower for sale in Europe the same as the one for sale in the US?

A. Yes.

Q. Did you plan to effect any of these improvements to the OMC outboards before you saw the test report on the Yamaha 25-horsepower—

. . .

A. . . .

We had no plans to upgrade the 25-horsepower engine until the Yamaha came along.

206. In October 1972, after he saw the test report on the Yamaha 25 h.p. outboard, Mr. Strang, of OMC, called for a five-year projection of the effect on OMC's sales and earnings which would result from the possibility of Yamaha's entry into the United States with outboard motors. (Strang, Tr. 365) The projection was based on the "arbitrary assumption that activity of Japanese outboard manufacturers would reduce [OMC's] world-wide sales below what we had otherwise forecast in the 50 horsepower and under category." (BX 23.)[10]

207. OMC's reaction clearly was for defense of its position in the United States as well as Europe. (Strang, Tr. 383-84):

Q. Mr. Strang, Did you have more concern about any one of the outboard motor exhibitors at the 1972 Tokyo Boat Show then others?

. . .

The Witness: Yes, we were most concerned about Yamaha.

By Mr. Dolan:

Q. And what was the nature of that concern, sir?

A. We had been stung by them abroad and we were very fearful of an invasion of the US market.

Q. Is that one of the reasons why you upgraded the OMC 25-horsepower outboard?

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[10] BX 23 was prepared on June 9, 1975, to describe the 1972 projection.

THE WITNESS: Since our engines are basically sold all over the world, we were improving the 25-horsepower outboard for defensive purposes in the US as well as abroad.

208. Mr. Strang testified about most likely entrants into the United States outboard motor markets (Strang, Tr. 338, 340):

Q. In 1972, were there, in your opinion, likely entrants into the manufacture and sale of outboard motors in the US?

. . .

THE WITNESS: I can't really say there was any likelihood of manufacture in the US. There was certainly the likelihood of sale in the US.

Q. And who would this be, Mr. Strang?

A. Foreign producers such as Volvo, Cariti, the Japanese manufacturers such as Yamaha, Suzuki, Kawasaki and Tohatsu.

209. The President of Eska believed in 1972 that potential entrants into the United States outboard motor market included Yamaha, Volvo, Suzuki and TAS. (Kascel, Tr. 615-17.)

210. In April 1975, the President of Mariner stated that (BX 1N):

For many years there were no real competitors in the outboard field outside the United States, except Yamaha. But there are signs that this is going to change; Volvo-Penta is already mounting a vigorous effort world wide, Renault is attempting to get into the outboard business, Tohatsu and Suzuki are expanding their lines to higher horsepower and are beginning to move out of Japan and there will certainly be others who will make the effort even though they may not succeed.

CONCLUSIONS OF LAW

I. *Jurisdiction*

The complaint alleges that the joint venture agreement, by eliminating Yamaha as one of the few likely entrants into the United States outboard motor market, constitutes a violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Section 7 of the Clayton Act states in part that:

> . . . [*N*]*o corporation engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of *another corporation engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition . . . . (Emphasis added.)

The acquired company here, Sanshin, has never by itself engaged in commerce, within the meaning of the statute. Complaint counsel argue, however, that Sanshin is part of a corporate family with Nippon Gakki at the head, Yamaha and YIC as sister corporations, and Sanshin as the offspring of Yamaha. The existence of any such corporate "family" is irrelevant in my opinion. The issue, rather, is whether Sanshin was dominated by Yamaha before the joint venture or by Yamaha and Brunswick (through Mariner[11]) at the time of the joint venture. Since both Yamaha and Brunswick were in interstate commerce,[11a] their domination over Sanshin would put that company in commerce. This involves the more familiar doctrine of piercing the corporate veil.

Sanshin, a Japanese corporation, was established in 1960, and its principal office is in Hamamatsu City, Japan.

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[11] The domination of Mariner by Brunswick was not contested.

[11a] Findings 6 and 24.

In May 1969, Yamaha purchased control of Sanshin. As a majority shareholder, Yamaha had the power to control Sanshin by, *inter alia*, appointing all of its directors. (CX 1Y.) Yamaha also acquired all the assets of Sanshin and transferred Yamaha tooling and equipment for outboard motor production to the Sanshin plant. (Findings 25-27.) For these reasons, Yamaha dominated Sanshin before the joint venture agreement.

Furthermore, Sanshin was dominated by both Yamaha and Brunswick (through Mariner) at the time of the joint venture agreement. When the memorandum of understanding for the joint venture was signed on March 9, 1972, Yamaha and Brunswick agreed to create a manufacturing joint venture to be established in Japan "between Yamaha Motor Co. . . . through its subsidiary Sanshin Industries, Co., Ltd., and the Mercury Mariner Division of Brunswick Corporation." (Finding 36.)

Yamaha and Mercury agreed that an outboard engineering group was to be established at Sanshin with responsibility for the design and development of all Sanshin products. Yamaha agreed to assist Sanshin in securing personnel for that engineering group. (Finding 54.)

On November 21, 1972, Brunswick entered into the joint venture agreement with Yamaha wherein it was provided that Mercury Marine International Company, a wholly-owned subsidiary of Brunswick, would be formed to purchase 62,000 shares of newly issued stock of Sanshin for $1.4 million. With the purchase of that stock, Mercury Marine International Company and Yamaha each owned 38% of the outstanding stock of Sanshin. The remaining 24% of the Sanshin stock is held by individual Japanese stockholders. (Findings 37-38.) Since 1972, Sanshin has manufactured outboard motors only for Yamaha or Mariner. (Finding 45.)

The joint venture agreement gives Yamaha the right to appoint six of Sanshin's eleven directors and the right to select the day-to-day operating officers of Sanshin, including the representative director (president) of the company. Mariner is given the right to appoint the other five directors. (Finding 40.) Mariner communicates on a daily basis with Sanshin, by telex, telephone and mail, regarding the joint venture and marketing of "Mariner" brand outboard motors. (Finding 13.)

Sanshin became a new enterprise when the joint venture was formed. Five of its eleven directors were appointed by Mercury. It then obtained technical advice from Mercury. (Finding 197.) Yamaha, through Sanshin, obtained access to the United States market through Mariner's experienced sales force. Upon the signing of the joint venture agreement, Sanshin became the joint venture company, formed by companies engaged in commerce for the purpose of manufacturing outboard motors in Japan for sale, among other places, in the United States by a sales company to be engaged in commerce.

A similar issue was before the Court in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). There, the joint venture company was not engaged in commerce at the time it was formed, but was so engaged at the time of the suit. The Court held that the jurisdictional requirement of Section 7 had been met, *id.* at p. 168:

> The test of the section is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise.

> Realistically, the parents, would not compete with their progeny. Moreover, in this case the progeny was organized to further the business of its parents, already in commerce, and the fact that it was organized specifically to engage in commerce should bring it within the coverage of § 7. In addition, long prior to trial Penn-Olin was actually engaged in commerce. To hold that it was not "would be illogical and disrespectful of the plain congressional purpose in amending § 7 . . . [for] it would create a large loophole in a statute designed to close a loophole." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 343 (1963). In any event, Penn-Olin was engaged in commerce at the time of suit and the economic effects of an acquisition are to be measured at that point rather than at the time of acquisition. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957). The technicality could, therefore, be averted by merely refiling an amended complaint at the time of trial. This would be a useless requirement.

Here, Sanshin was (through domination by Yamaha) engaged in commerce before the joint venture. Furthermore, as the joint venture company, Sanshin was formed by companies engaged in commerce and which appoint *all* of the directors and *all* of the day-to-day operating officers of the company. Sanshin is dominated by Yamaha and Brunswick (and Mariner), and since they are engaged in commerce, so is Sanshin.

Since the joint venture company Sanshin was formed by companies engaged in commerce, for the purpose of manufacturing outboard motors and selling them through a company engaged in commerce, Sanshin was also engaged in commerce. "To hold that it was not 'would be illogical and disrespectful of the plain congressional purpose in amending § 7 . . . [for] it would create a large loophole in a statute designed to close a loophole.'" *United States* v. *Penn-Olin Chemical Co.*, *supra*.

Even if Sanshin has not engaged in commerce, and Section 7 did not apply here, the complaint also alleges that the joint venture violates Section 5 of the Federal Trade Commission Act. Section 5 was amended on January 4, 1975, to expand the Commission's jurisdiction to cover violations "affecting" commerce, Section 201(a) of Title II of the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. 93-637, 15 U.S.C. § 45(b). The complaint was amended on May 7, 1976, to allege that the joint venture affected commerce. Although the joint venture took place in 1972, before the amendment, the effects of a joint venture are weighed at the time of the suit. *United States* v. *Penn-Olin Chemical Co., supra; United States* v. *E. I du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957). So the issue is whether the Commission has jurisdiction now, not in 1972. Since the joint venture is affecting commerce in the United States at the time of the suit, the Commission has jurisdiction under Section 5.[12]

II. *Line of Commerce*

The joint venture in this proceeding would violate Section 7 of the Clayton Act if "*in any line of commerce* in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (Emphasis added.) The relevant section of the country has been stipulated to be the entire

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[12] In the order of May 7, 1976, I also stated that the Magnuson-Moss amendment has retroactive application, because of the maxim "Expressio unius est exclusio alterius." Since Congress specifically excluded retrospective treatment to two parts of the statute, it is implied that the rest of the statute, including the jurisdictional amendment, should be read to apply retrospectively. I found it unnecessary to hold that the amendment applies retroactively since the present effect of the joint venture gives the Commission jurisdition.

United States. The issues at contest are the lines of commerce and the effects of the transaction upon competition.

In a Section 7 suit, it is necessary first to define lines of commerce for the purpose of evaluating the anti-competitive effect of the proposed acquisition. Line of commerce has been defined to mean the relevant product market. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962). In determining the outermost boundaries of a product market, analysis should be guided by examination of the reasonable interchangeability of use, or the cross-elasticity of demand, between the product and substitutes for it. *Id.* at p. 325. Lack of interchangeability in use does not automatically bar recognition of a broader line of commerce where, for technical or other reasons, there is commonality in production and distribution resulting in a distinct and recognized "industry" of firms who sell a broad line of products. *Liggett & Myers, Inc.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 21,151 at pp. 21,055-56 (FTC April 29, 1976) (appeal pending); *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 10-12 (7th Cir. 1971). In *British Oxygen Co., Ltd.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 21,063 at p. 20,908 (FTC December 22, 1975) (appeal pending), the Commission held industrial gases to be a relevant market, despite their lack of interchangeability of use, since buyers prefer to get delivery from one supplier,[13] and technical skills used in production are very similar for many gases.

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[13] Another example of looking at the buyers' need in determining market boundaries, is setting "commercial banking" apart as a line of commerce because of the "cluster of products and services" offered in response to "settled consumer preferences." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 356-57 (1963); *United States* v. *Connecticut Nat'l Bank*, 418 U.S. 656, 660-66 (1974); *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 360 (1970).

In the outboard motor industry, except for some overlap near the dividing line, there is very little interchangeability of use between high and low horsepower engines. (Findings 89-90, 102-03.) And there is little commonality of production and distribution between them. Advanced technology and know-how and different production facilities are required in the manufacture of high horsepower outboards. (Findings 92, 105-19.) Low horsepower outboards are sold through mass merchandisers. (Finding 97.) By contrast, since selling high horsepower outboards to consumers is a more complex business and requires more skill and service, they are sold almost exclusively through marine dealers. (Findings 124-27.) Because of these variations in the industry, all outboard motors sold in this country do not constitute a relevant product market for the purpose of determining the effect of an acquisition alleged to violate Section 7 of the Clayton Act.[14] Furthermore, an analysis of the differences in the manufacturing and merchandising of low and high horsepower outboard motors, using the criteria specified in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), will show that they constitute two separate relevant product markets.

There are distinct differences between the two relevant markets in this case: low horsepower gasoline outboard motors and high horsepower gasoline outboard motors.[15]

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[14] The shoe industry has been rejected as a relevant market under Section 7. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 299 (1962). The Supreme Court there upheld the district court's finding that there were three markets involved: shoes for men, women and children. *Id.* at 325-28.

[15] There is some overlap in use and characteristics near the dividing line between the two markets. The fact that some of the outboards near this line are limited substitutes for each other does not preclude a finding of distinct markets. *Beatrice Foods Co.* v. *FTC*, Trade Reg. Rep. (1976-2 Trade Cases) ¶ 61,036, at p. 69,616 (7th Cir. 1976).

The products in these markets differ substantially in price. (Findings 93-94, 120.) Manufacturers of low horsepower outboards establish prices for their products without referring to the prices of high horsepower outboards. (Finding 94.) Manufacturers of high horsepower outboard motors establish prices for their products without referring to prices of low horsepower outboards. (Finding 120.) The products are sold to different customers for different uses. (Findings 89, 102.) Small outboards cannot be used for water skiing and pushing large boats, and it is impractical to use large outboards on small boats. Production facilities for the two differ greatly, and the large outboards cannot be made on a production line meant to make small outboards. (Findings 92, 119.)

In *British Oxygen Co., Ltd., supra,* the Commission held that "inhalation anesthesia equipment and accessories" was not a relevant line of commerce, pointing out that a manufacturer of one item within the product grouping could not readily produce other items and there was no evidence that manufacturers offered a full line of such products.[15a] Here, there is a similar lack of production flexibility in the manufacture of all outboard motors. The smaller manufacturers, producing only low horsepower outboards, do not have the capability of producing high horsepower outboards, and they do not offer a full line of outboard motors. (Findings 84, 99, 105.)

The characteristics of large outboards are distinct, requiring advanced technology and know-how. (Findings 105-19.) High horsepower outboards are sold almost exclusively through marine dealers offering a full line of out-

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[15a] Trade Reg. Rep. (1973-76 Transfer Binder) at p. 20,922.

board motors, replacement parts and service, as well as boats and accessories. (Findings 97, 123-27.) Low horsepower outboards, by contrast, are also sold by mass merchandisers, hardware stores, sporting goods stores, as well as through private label distribution. (Finding 97.) The barriers to entry to both markets are significant, but, as to the manufacture and sale of large outboards, they are particularly high, and include the requirement of high capital investment and the need for specialized technology, a broad line, and access to distribution through a network of marine dealers offering sales and service at convenient locations and a full line of marine products. (Finding 81.) There is evidence of industry recognition of the division of the markets by horsepower. (Findings 82; 83, footnote #3.)

With the lower barriers to entry in the market for low horsepower outboards and distribution through mass merchandisers, price competition is "quite severe." (Finding 96.) The market for larger outboards with its substantial entry barriers, by contrast, is distinguished by mild price competition and higher profits. (Findings 73-81, 100-01, 121-22.)

All outboard motors are used to propel boats through water and are attached to the back of the boat. In this sense they are related. But the realities of the market place, and this record, show that there are additional factors which determine where to weigh the effects of the joint venture involved in this case, and those factors lead to two markets: (1) low horsepower gasoline outboard motors; and (2) high horsepower gasoline outboard motors.

III. Effects of the Joint Venture on Competition

A. Section 7

The legislative purpose for the amended Section 7 of the Clayton Act was to effect a policy "that corporate growth by internal expansion is socially preferable to growth by acquisition" and to preserve "the possibility of eventual deconcentration." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 n.42, 370 (1963). And, "[i]t is the basic premise of [§ 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.'" *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280 (1964). Section 7 was designed not only to arrest monopolistic practices after they are in full swing but also to prevent anti-competitive effects of market power concentration in their incipiency. S. Rep. No. 1775 and No. 2734, 81st Cong., 2d Sess., 1950-52 U.S. Cong. Admin. News 4295-98. In *FTC* v. *Proctor & Gamble Co.*, 386 U.S. 568 (1967), the Court held, at p. 577 that:

> The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with the probabilities, not certainties.

But, while Section 7 does not require certainty of anticompetitive effect, "proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). The language of the statute prohibits acquisitions whose effect "may be" substantially to lessen competition. The statute "look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277

(1966). Section 7 prohibits the elimination of potential competition as well as of actual competition. *FTC* v. *Proctor & Gamble Co.*, 386 U.S. 568, 580-81 (1967). *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973, *aff'd mem.*, 418 U.S. 906 (1974).

B. Potential Competition

In *General Mills, Inc.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,457 (FTC 1973), the Commission summarized the two theories of injury to competition by removal of a potential entrant by a merger, *supra*, at p. 20,360:

> First, the existence of what is *perceived* to be a significant potential competitor at the edge of a concentrated market may act as a restraint upon high prices in that market even though actual entry never occurs or has been internally rejected by management. Removal of one of a few such "perceived" entrants may dilute this competitive force. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973).
>
> Secondly, aside from whether it is viewed as a potential competitor by firms in the market, elimination of a potential entrant by acquisition of a leading firm in that market will eliminate the competition that would have been added had the acquiring firm entered the market *de novo* or by toehold acquisition.[16]

And the potential competition doctrine has been applied to a joint venture. *United States* v. *Penn-Olin Chemical*

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[16] The Supreme Court has not yet found a violation where an acquisition was challenged under § 7 only on the grounds that the acquiring company could, but did not, enter *de novo* or through a "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner. *United States* v. *Falstaff Brewing Co.*, 410 F.2d 526, 537 (1973); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 625, 639 (1974).

Co., 378 U.S. 158 (1964), *complaint dismissed on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd by an equally divided Court*, 389 U.S. 308 (1967). In that case, Pennsalt Chemicals Corporation and Olin Mathieson Company formed a joint venture for the production of sodium chlorate. After holding that §7 of the Clayton Act extended to joint ventures, the Court reversed the lower court's dismissal of the suit based on the finding that Pennsalt and Olin Mathieson would not both have entered the sodium chlorate industry but for the joint venture. See *id.* at 167-73. The Court held that the lower court should have decided whether, but for the joint venture, one corporation would have entered the market while the other remained on the edge of the market exerting a procompetitive effect. See *id.* at 173-74. The Court held (*id.* at 174) that:

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be substantial incentive to competition which cannot be underestimated.

The potential competition doctrine has previously been applied in international mergers or acquisitions. *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd without opinion*, 385 U.S. 37 (1966). Enforcement action has also been taken against foreign companies participating in joint ventures and making acquisitions in this country. See, *e.g.*, *United States* v. *Monsanto Co.*, Trade Reg. Rep. (1967 Trade Cases) ¶ 72,001 (W.D. Pa. 1967, consent decree); *United States* v. *Standard Oil Co.*, Trade Reg. Rep. (1970 Trade Cases) ¶ 72,988 (N.D. Ohio 1970, consent decree). See also *United States* v. *Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966).

C. Actual Future Potential Entry

In *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Court again recognized that a merger between potential competitors may lessen competition within the meaning of Section 7 if the effect is to eliminate a present beneficial influence on a market resulting from the "outside" company's position as a perceived potential entrant. The Court remanded the case for an assessment by the trial court of this possibility, but declared that it was "leaving for another day" the second theory of potential competition which the Court described as involving:

> a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through "toehold" acquisition and that there is less competition than there would have been had entry been in such a manner. [410 U.S. at 537.][17]

In *United States* v. *Marine Bancorporation*, 418 U.S. 602 (1974), the Court faced the question left open in *Falstaff*. The Court's opinion sets forth three prerequisites that must be shown before "the doctrine comes into play": (1) A concentrated market that is not performing competitively (*id.* at 631); (2) The acquiring company has available feasible means for entering the market other than by acquiring a leading company; and (3) A showing that "those means offer a substantial likelihood of ulti-

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[17] The Court observed (*id.* at 537-38):

> There are traces of this view in our cases, see *Ford Motor Co.* v. *United States*, 405 U.S. 562, 567 (1972); *id.*, at 587 (Burger, C.J., concurring in part and dissenting in part); *FTC* v. *Proctor & Gamble Co.*, 386 U.S., at 580; *id.*, at 586 (Harlan, J., concurring); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S., at 173, but the Court has not squarely faced the question, if for no other reason than because there has been no necessity to consider it.

mately producing deconcentration of that market or other significant procompetitive effects" (*id.* at 633).[18]

The court found the latter two prerequisites were not met in that case and stated (*id.* at 639):

> Accordingly, we cannot hold for the Government on its principal potential-competition theory. Indeed, since the preconditions for that theory are not present, we do not reach it, and therefore we express no view on the appropriate resolution of the question reserved in *Falstaff*. We reiterate that this case concerns an industry in which new entry is extensively regulated by the State and Federal Governments.

Although the Supreme Court has thus stated that it has never squarely decided the question, the Commission and a number of courts have held that elimination of a "probable future entrant" may violate Section 7.

This theory is the principal basis of the Commission's opposition to geographic market-extension mergers by large dairy companies.[19] The Commission has recognized the doctrine in a number of other cases.[20] Likewise, a num-

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[18] One such procompetitive effect is a future perceived potential entrant effect where the acquiring company would have been on the edge of the target market and exerted a procompetitive effect in the *future*. *British Oxygen Co., Ltd., supra,* Trade Reg. Rep. (1973-76) Transfer Binder), at 20,912.

[19] *See, e.g., Beatrice Foods Co.*, 67 FTC 473, 720-22 (1965); *FTC Enforcement Policy with Respect to Mergers in the Dairy Industry,* 1 CCH Trade Reg. Rep. ¶ 4532.

[20] See *British Oxygen Co. Ltd.*, CCH Trade Reg. Rep. ¶21,063 (1976) (on appeal); *The Budd Co.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,998 (FTC 1975); *General Mills, Inc.*, 83 FTC 696, 732 (1973); *Beatrice Foods Co.*, 81 FTC 481, 528 (1972); *Bendix Corp.*, 77 FTC 731, 817-19 (1970), *rev'd and remanded on other grounds,* 450 F.2d 534 (6th Cir. 1971).

ber[21] of courts have applied the actual potential entrant doctrine.

The actual future potential entry doctrine calls for examining the feasible means of entry other than the challenged transaction, and analyzing the incentive and capability of the acquiring firms to enter the market either *de novo* or by toe-hold acquisition.[22] *United States* v. *Bancorporation*, 418 U.S. 612, 633, 642 (1974). In looking at incentive, the firms' maturing present markets, commitment to growth by acquisition and the attractiveness of the market are important. *United States* v. *Phillips Petroleum*, 367 F. Supp. 1226, 1245 (C.D. Cal. 1973), *aff'd per curiam*, 418 U.S. 906 (1974). In determining the firms' capabilities to enter *de novo* or by a toe-hold acquisition, factors which may be considered include: the firms' expertise in manufacturing technology (extensive time necessary to develop the product by firms knowledgeable and active in the field corroborates the technical sophistication involved); availability of engineering expertise and purchased components; transferability of technical knowledge from present production methods; availability of distribu-

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[21] *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. at 1232 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974); *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 77-78 n.8 (10th Cir. 1972), *cert denied*, 416 U.S. 909; *United States* v. *Wilson Sporting Goods*, 288 F. Supp. 543, 560 (N.D. Ill. 1968); *United States* v. *Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966); *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 147 (N.D. Cal. 1966), *aff'd without opinion*, 385 U.S. 37 (1966); *Ecko Prods. Co.* v. *FTC*, 347 F.2d 745, 752-53 (7th Cir. 1965).

[22] A firm with less than 10% market share presumably may qualify as a toe-hold. *Budd Co.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,998, p. 20,857 (FTC 1975); *Beatrice Foods Co.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,944, p. 20,972 n.8 (FTC 1975).

tors; and marketing strength through servicing capability, brand name recognition and advertising capability. *United States* v. *Black and Decker Mfg. Co.*, Trade Reg. Rep. (1976 Trade Cases) ¶ 61,033, at pp. 69,585-92 (D. Md. 1976).

D. Perceived Potential Entry

In *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Supreme Court recognized that a potential competitor can have *present* procompetitive effects on the market, as well as providing a means of *future* deconcentration by actual entry into the market, *id.* at 532-33. The Court remanded for a determination of the question whether the presence of Falstaff on the edge of the market had any present procompetitive effect prior to the acquisition. See also *FTC* v. *Proctor & Gamble Co.*, 386 U.S. 568, 581 (1967).[23]

A good explanation of the procompetitive effects of perceived potential competition is in *United States* v. *Phillips Pet. Co., supra,* at 1232-33.

> The edge effect, sometimes termed the "waiting-in-the-wings" or the "on-the-fringe" effect, is the beneficial effect upon competition exerted when a company is poised on the edge of the market, threatening to enter if market conditions become sufficiently favorable. The importance of the edge effect derives from the realization that the competitive behavior of companies is not determined solely by the actions and intentions of those in the market, but also by the actions and perceived intentions of those outside the market who may come in. The presence of a potential entrant on the edge of the market exerts a moderating influence on those inside. If the firms inside raise prices

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[23] In *Proctor & Gamble,* the acquisition violated § 7 not only because of the fact that P&G's edge effect influenced the behavior of members of the target market, but also because the acquisition raised entry barriers and dissuaded smaller firms from aggressively competing. *Id.* at 578.

> beyond a certain level, for instance, a company on the edge may decide to enter because the profitability of entering would be enhanced by the higher prices. Its entry, in turn, would made conditions in the market more competitive.

In addition to the economic facts considered in the actual potential entry theory, the reasonable expectations of the competitors in the market are relevant in determining the perceived potential entry effects. *United States* v. *Black and Decker Mfg. Co., supra,* at p. 69,596. This branch of the potential competition doctrine looks to evidence of the probability that the acquiring firm on the edge of the market in fact exerted a present procompetitive influence. The Supreme Court in *Marine Bancorporation, supra,* defined the perceived potential entry doctrine as follows at pp. 624-25:

> Unequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger is rarely available. Thus . . . the principal focus of the doctrine is on the effects of the premerger position of the acquiring firm on the fringe of the target market. In developing and applying the doctrine, the Court has recognized that a market extension merger may be unlawful if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's pre-merger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market. In other words, the Court has interpreted § 7 as encompassing what is known as the "wings effect"—the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in the market as likely to enter *de novo*. . . . The elimination of such present procompetitive effects may render a merger unlawful under § 7.

The Court in *Marine Bancorporation*, while reserving final decision on the status of the actual potential entrant aspect of the potential competition doctrine, stated as two preconditions to its application: (1) that the acquiring firm have feasible alternative means of entering the relevant market other than by acquisition of the target company, and (2) that those alternative means "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." 418 U.S. at 633, 639. The Court suggested that these same preconditions are relevant to the perceived potential entrant aspect of the doctrine. *Id.* at 639.

The facts of *Marine Bancorporation* redefined the potential competition test. There, even if the acquiring company could have entered the target market *de novo* or by a foothold merger, bank regulations against branches made it highly unlikely that significant procompetitive deconcentration would occur. *Id.* at 636-39. *Marine Bancorporation* however, retained the basic tenets for finding perceived potential competition. That doctrine was set out in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 533-34 (1973):

> The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into the market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown; and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under Section 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine

> whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.

Thus, if entry into the target market *de novo* or by foothold acquisition would not "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects," the acquiring company could not "be said to be a potential competitor on the fringe of the market with likely influence on existing competition."

It is the *inferred* effect of the presence of the acquiring company on the edge of the market due to the perception of those firms in that target market which the theory tries to save. And no actual market response to the influence of the acquiring company need be introduced. *United States* v. *Black and Decker, supra,* at p. 69,598.[24] In *British Oxygen, supra,* the Commission reversed the administrative law judge's finding that BOC's position on the fringe of the market exerted a procompetitive influence, because of the failure of record evidence of that effect. *Id.* at p. 20,911 n.8. The better rule is expressed in *United States* v. *Phillips Petroleum Co., supra.* There the court found that the objective evidence demonstrated a procompetitive effect from the position on the edge of the market of the potential entrant prior to the acquisition. But even in the absence of evidence of specific actions by firms in the market prior to the acquisition, the court would have inferred such influence if the market were concentrated. *Id.* at 1257: "Whether or not it can be shown that specific actions of companies in the market have been influenced by the pres-

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[24] Absence of any actual market response, however, tends to corroborate objective factors indicating that the acquiring company was not one of the most likely perceived potential entrants. *Id.* at pp. 69,598-99.

ence of the potential entrant on the fringe, it must be assumed that such influence exists where the market is concentrated." This reasoning is in line with *United States* v. *Falstaff Brewing Corp., supra,* which stated at 534 n. 13, that "[t]he Government did not produce direct evidence of how members of the [target] market reacted to potential competition from Falstaff, but circumstantial evidence is the life blood of antitrust law . . . especially for § 7 which is concerned 'with probabilities, not certainties.'" At the least, objective economic facts showing a reasonable probability of potential entry reaches the *prima facie* stage. *United States* v. *Penn-Olin Co., supra,* 378 U.S. at 175.

E. Applicability of the Doctrine of Potential Competition

1. Concentration Ratios

The Supreme Court stated in *United States* v. *Marine Bancorporation, Inc.,* 418 U.S. 602 (1974), that the potential competition doctrine is applicable only in cases in which the relevant market or submarket is oligopolistic, *id,* at pp. 630-31:

> The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services. If the target market performs as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant. The present procompetitive effects that a perceived potential entrant may produce in an oligopolistic market will already have been accomplished if the target market is performing competitively. Likewise, there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive.

If there is evidence of high concentration ratios, a *prima facie* case is established that the relevant market is a candidate for the potential competition doctrine. *United States* v. *Marine Bancorporation,* at p. 631. At this point in a case, the burden then shifts to the respondents to show that the concentration ratios, which can be unreliable indicators of actual market behavior, (see *United States* v. *General Dynamics Corp.,* 415 U.S. 486 (1974)), did not accurately depict the economic characteristics of the market. *United States* v. *Marine Bancorporation, supra,* at p. 631.

The market shares here in 1973 for low horsepower (Finding 86) or high horsepower (Finding 101) show that OMC was the dominant firm, with half of the sales of low horsepower outboards and over 60% of the high horsepower market. Mercury had about one-quarter of both markets, with the rest being shared by three domestic manufacturers.[25] Chrysler had the rest of the high horsepower market, and shared the remainder of the low horsepower market with Eska and Clinton.

In *Stanley Works* v. *FTC,* 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973), the cabinet hardware industry with a four-firm concentration ratio of 49-51% was held to be concentrated. The California retail

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[25] The market share findings are not precise because they do not exclude foreign sales by United States manufacturers and do not include sales in this country by foreign manufacturers (which have not been an important factor in the United States market—Finding 67.) These market share findings do show the broad picture of oligopoly, however. "[P]recision in detail is less important than the accuracy of the broad picture." *United States* v. *Brown Shoe Co., Inc.,* 370 U.S. 294, 342 n.69 (1962). See also *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 364 n.40 (1963); *A. G. Spalding & Bros., Inc.* v. *FTC,* 301 F.2d 585, 610-11 & n.20 (3d Cir. 1962).

gasoline market in which the top four firms accounted for 61% of the refining capacity and 58% of the sales was held to be highly concentrated. *United States* v. *Phillips Petroleum Co., supra,* 367 F.2d at 1252. And in *British Oxygen Co., supra,* at p. 20,909, the Commission held that the industrial gases industry, with a four-firm concentration ratio of 70% and an eight-firm ratio of over 80% was highly concentrated.

The market shares here show a tight oligopoly by these standards, and the burden shifts to respondents to demonstrate with evidence of actual competitive market performance that these concentration ratios do not accurately reflect the competitive nature of the markets.

2. Competitiveness of the Markets

In analyzing the relevant markets to decide whether the potential competition doctrine is applicable, the factors which were considered by the court in *United States* v. *Black and Decker Mfg. Co., supra,* 1976 Trade Cases at pp. 69,579-86, in determining the competitiveness of the market included: demand for the product (growth is significant since it can provide incentive for new entry); a fluid market (market entry and exit can indicate competitive behavior and new entrants add production capacity, encouraging lower prices); entry barriers (such as technical manufacturing expertise); ability to obtain marketing outlets; product improvements and innovation (industry commitment to research and development); the impact of private label sellers and price competition.

These same factors applied to the markets here show as follows:

1. Demand for the product—For several years demand has exceeded supply in the industry. (Findings 64-71.) The total United States market for outboards in units is expected to double in the next 10 years. (CX 108U.)

2. Fluid market—Historically, this industry has had a declining number of firms. (Finding 77.) Since the early 1970's, however, several new firms, including Mariner, have started selling outboards in the United States. They are not yet a factor in the market. (Findings 87, 88.)

3. Entry barriers—The entry barriers here, especially to the high horsepower outboard market, are significant, including capital costs, technology and know-how, the need to produce a broad line and to develop a sales network. (Findings 81, 99, 105.)

4. Ability to obtain marketing outlets—High horsepower outboard motors are sold almost exclusively through marine dealers, and establishing a network of marine dealers is a substantial entry barrier. (Findings 123-127; Anderegg, Tr. 816.)

5. Product improvement—Both markets have seen substantial product improvement. (Findings 72, 205.) There has been intense competition in the high horsepower market in offering product features. (Finding 105.) OMC has initiated programs for the design and development of low horsepower engines to be competitive in that market. (Findings 95, 205.)

6. Impact of private label sales and price competition—Price competition in the low horsepower market, primarily because of sales by mass merchandisers and private label sellers, has been quite severe. (Findings 96-98; CX 90Z-44, 49.) In the high horsepower market, competition has been less intense and profits have been higher. (Findings 70, 72-76.) In 1969, the following pricing existed for 4 or 5 horsepower outboards (CX 90U):

Chrysler (5 h.p.)	— $295
Mercury (4 h.p.)	— 240
Johnson/Evinrude (4 h.p.)	— 207
Eska (5 h.p.)	— 160
Clinton (5 h.p.)	— 150

In *Black & Decker, supra,* the market analysis demonstrated that competitive performance in the gasoline powered chain saw market offered conflicting indications, *id.* at p. 69,583:

> As the foregoing analysis demonstrates, various facets of competitive performance in the gasoline powered chain saw market offer conflicting indications. The market was a rapidly growing one that had attracted a number of new entrants, notably foreign gasoline powered chain saw manufacturers. While these entrants enjoyed significant growth, their arrival provoked no discernible trend to deconcentration, and, in fact, their market share remains low. Moreover, significant technological barriers to entry exist; marketing, servicing and advertising also pose problems for a new entrant. Yet the market has been characterized by aggressive product innovation as well as by the expansion of production facilities.

These factors, combined with a lack of clear price competitiveness, led the court to hold that defendants had failed to meet their burden to establish that the high concentration ratios there did not accurately depict the economic characteristics of the market.

Here, the competitive indicators of the markets are also mixed. The markets are rapidly growing, attracting new entrants, but these new entrants have not yet established a trend to deconcentration. Significant technological barriers, especially to the high horsepower market, exist. Marketing and servicing barriers, again especially for high horsepower outboards, pose problems for the new entrant. Both markets have had impressive product innovation and expansion of production facilities.

These factors show a mixed review of competitive behavior. But one—perhaps the most important[26]—competi-

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[26] *Black & Decker, supra,* at p. 69,582.

tive factor remains: price competition. The low horsepower market has intense price competition, because of sales by mass merchandizers and through private labels. That market "performs as a competitive market in traditional antitrust terms." *Marine Bancorporation, supra,* at pp. 630-31. Therefore, even though the market has high concentration ratios, it is not a candidate for the potential competition doctrine. *Id.* at p. 631. The market for high horsepower outboards, on the other hand, has no similar indication of competitive behavior, and the potential competition doctrine is applicable to that market.

F. Reasonable Probability Test

The issue for determining potential competition in this case is whether it is "reasonably probable" that, but for the joint venture, Yamaha would have entered, or Brunswick would have expanded its production facilities in the high horsepower market here found relevant. Certainly is not required. *British Oxygen Co. Ltd., supra,* at p. 20,916.

In *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1974), the Court, after reviewing objective factors that indicated that each of the parties to the joint venture had the ability and incentive to enter the market alone, concluded (*id.* at 175):

> Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the *statutory requirement of reasonable probability into a requirement of certainty. This we will not do.* [Emphasis added.]

The "reasonable probability" standard was applied in *Ekco Prods. Co.* v. *FTC,* 347 F.2d 745 (7th Cir. 1965) where the actual potential entrant issue was the question before the court. Citing *Penn-Olin,* the court stated that "the test

is whether there is a 'reasonable probability' that the acquiring corporation would have entered the field by internal expansion but for the merger." *Id.* at 752-53. In that case the court agreed with the Commission that the acquisition by Ekco Products Company of the leading manufacturer of commercial meat-handling equipment violated Section 7 of the Clayton Act because there was a "reasonable probability that Ekco would have entered the commercial meat handling industry by internal expansion." *Id.* at 753.

And in *Marine Bancorporation,* both the district court and the Supreme Court assumed throughout their opinions that the reasonable probability standard was applicable in a potential entrant case. *United States* v. *Marine Bancorporation,* 1973-1 Trade Cases ¶ 74,496 at p. 94,246 (W.D. Wash. 1973), *aff'd,* 418 U.S. 602, 616, 617 (1974).

FTC v. *Atlantic Richfield Co., et al.,* (4th Cir. decided January 12, 1977), No. 797 BNA AT&T Reg. Rep., is to the contrary. There, the court of appeals affirmed the district court which refused preliminary relief pending resolution of administrative proceedings, in part, on the grounds that there was not a substantial likelihood that the Commission would be able to establish a violation of § 7 under the actual potential entry doctrine. The circuit court required a higher burden of proof in mergers alleged to eliminate future potential entry than in horizontal or vertical mergers or in a perceived potential competition case. (See pp. 12-15 slip opinion.) The court pointed out that the conglomerate merger there was for purpose of diversification and involved no product or market extension. Further, the acquiring company was not poised on the fringe of the market; it had no technological skills readily transferrable to the market; and it had no channels of distribution which might be used in that market.

In that context, it is not surprising that the circuit court adopted a different standard of proof. The standard adopted, however, is very stringent. The court would require certain, unequivocal proof that, but for the merger, the acquiring company would have entered the market *de novo* or the equivalent. In creating this rule, the court read *United States* v. *Falstaff Brewing Co.*, 410 U.S. 526 (1973), as holding that in a future potential competition case "very little evidence is required to prove that there would not be *de novo* entry." (See p. 14 slip opinion.) The court based this on its observation that "the Supreme Court did not disturb the district court's finding that Falstaff was not an actual potential entrant" and "that the district court relied almostly solely on management's post acquisition statements that Falstaff would not enter *de novo*." (See p. 14 slip opinion.) In fact, the Supreme Court clearly and specifically refused to pass on the actual potential competition issue. That question was left "for another day." 410 U.S. at 537. Therefore, no weight should be given to the Court's failure to revise the district court's disposition of the actual potential competition case.

The standard of proof in a Section 7 case is stated in the language of the statute. That test does not call for certain proof, only for a reasonable probability of violation. The type of acquisition involved may, however, lead to different standards of proof of economic evidence needed to show a violation, as for example in a horizontal merger case as contrasted with a vertical or conglomerate. A horizontal merger removes an independent decision-making force from the market; a vertical or conglomerate simply substitutes one firm for another.[27] Thwarting horizontal

[27] A joint venture may in fact add another decision-making force, *infra*.

mergers may more readily lead to procompetitive internal expansion since the entry barriers are lower to a firm already in the market.[28] And vertical and conglomerate mergers, although not without possibilities of anticompetitive consequences, may lead to economies and do not increase the market position of the merged firms in either of the markets involved. This would suggest varying standards of proof which are: hardest on horizontal mergers, easier on vertical, and least severe on conglomerates. Turner *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1320-22 (1965). Further stratification of the standards of proof required may be appropriate where the acquisition involves a product or market extension or a joint venture, or where the type of potential competition involved is future or perceived. But none of these ramifications remove "may" from the standard set forth in the statute.

G. Potential Competition in the High Horsepower Market

The thrust of complaint counsel's case was directed at showing the unlawful effects of the transaction by concentrating on the alleged elimination of Yamaha as a potential future entrant and as a perceived potential competitor on the edge of the market. The effects of the joint venture, however, should be analyzed to see not only whether Yamaha was removed as a potential competitor, but also whether the transaction eliminated potential competition by the unilateral expansion of a second line by Mercury. Since this latter theory was not alleged or proved, no finding of violation can be based on it, *Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971), and it is explored here only

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[28] See, *e.g.*, *United States* v. *Falstaff Brewing Co.*, *supra*, at p. 568 n.20 (Mr. Justice Marshall concurring).

to put the transaction in context and to show its full impact on competition in the relevant market.

In order to determine whether Yamaha was a potential entrant and whether, but for the joint venture, Mercury would have unilaterally increased its production facilities, the following factors are considered: (1) the fact that Yamaha was already in the business of producing low horsepower motors, and entry into the United States market for high horsepower outboards would be a product and market extension; (2) Yamaha's interest in the market and unsuccessful attempts to enter the United States market for low horsepower outboards; (3) Yamaha's capability to enter the United States market unilaterally; (4) Yamaha's incentives to enter the United States market; (5) recognition by United States manufacturers that Yamaha was a potential entrant; (6) Mercury's capability and incentives unilaterally to bring in a second line; (7) feasibility on a unilateral move by Yamaha or Mercury; and (8) economic facts relating to the structure and degree of concentration of the market and barriers to entry therein.

On the basis of the objective evidence, I find that Yamaha was a likely potential unilateral entrant into the United States high horsepower outboard market, and in fact was the most likely potential entrant; and Yamaha exerted, prior to the joint venture, a substantial procompetitive effect on the behavior of those in the market from its position on the edge of the market.

1. Incentive of the parties to the joint venture

Mercury began planning a second line of outboard motors which it hoped would be the means of increasing its market share. (Finding 128.) Mercury wanted to obtain new dealers, and with a second line available, a marine

dealer selling this new line could be located near an existing Mercury dealer, thereby adopting a sales tactic long used by OMC. (Findings 125, 129.) Mercury also wanted to try new distribution through private labeling and mass merchandisers and through camper retailers, and sport and fishing stores. (Finding 130.) In addition, Mercury wanted to meet the demands of the low horsepower market to preempt foreign entrants. (Findings 131-132.)

Yamaha's incentive for entering the United States outboard market was that it is the largest market in the world (Findings 65-66), as well as a very profitable market. (Findings 73-76, 121, 122.)

2. Capability

When the decision was reached for Mercury to have a second line, its production facilities were already strained to meet demands for existing Mercury marine products. (Findings 71, 134.) In addition to the expense involved, a wait of about five years would be necessary to build new plants to produce the second line. (Finding 135.) Mercury therefore started looking for a joint venture partner. (Finding 136.)

Before entering the joint venture, Yamaha tried twice to market outboards in the United States. In 1968, Yamaha tried to market three low horsepower outboards but the attempt failed because of product deficiencies and because it tried to market the outboards primarily through motorcycle dealers. (Findings 154, 155.) In 1971, Yamaha tried again through Sears, Roebuck but again failed because its outboards were too expensive. (Findings 156-58.) Yamaha continued to have great interest in the United States market and increased the quality of its outboards. (Findings 159-170.)

By 1972, Yamaha had 70% of the Japanese outboard market, and sold throughout the world except the United

States. (Findings 173, 174.) Yamaha went into the European market in 1968, and by 1972 had 12% of the low horsepower market and was second to OMC. (Finding 184.)

Yamaha had a successful history of entering United States markets for motorcycles and snowmobiles. Yamaha had entered the United States market for motorcycles in 1959. By 1974, it had 20% of the market (Finding 176.) Yamaha entered the United States market for snowmobiles in 1968 and by 1974 sold eleven or twelve models in this country. (Finding 177.) The "Yamaha" brand name carries public recognition in the United States through consumer and trade advertising. (Finding 178.)

Prior to the joint venture, Yamaha generally had a simple, economical low horsepower line of outboards suitable for commercial fishing and transportation. (Findings 182, 185.) The Yamaha line lacked the high horsepower and some of the features common on outboards sold for pleasure boating in the United States. (Finding 183.) From the attempt to penetrate the United States outboard market in 1968 Yamaha learned the value of a full line and distribution through marine dealers. (Findings 186-188.) Yamaha had also determined that it would take time to develop higher horsepower outboard motors necessary to enter the market. (Finding 192.)

Yamaha increased the size of its largest outboard from 8 h.p. in 1969 (Eguchi, Tr. 667) to 55 h.p. in 1972. (Finding 170.) By that time, Yamaha had added some of the features necessary for the United States market, such as water cooling and two-cylinder engines. (Finding 164.) Yamaha 25 h.p. was a "topnotch, ultra-modern outboard" (Finding 166), able to compete favorably with similar outboards sold in the United States. (Findings 167, 168.) Yamaha's 55 h.p. was not as good, lacked features and had a cost problem, but was basically a good engine (Finding 170), and since Yamaha developed the excellent 25 h.p.

outboard, they "must have had the technology to develop a larger engine." (Strang, Tr. 418.)

With a higher horsepower outboard, Yamaha would probably be able to gain distribution in this country through marine dealers. Yamaha's full line of boats would make it an attractive supplier for marine dealers. (CX 107L.) Marine dealers are generally franchised on an annual basis by one of the three largest outboard motor firms, OMC, Mercury or Chrysler, and handle only one line. (Findings 125-127.) Dealers sometimes switch brands. (Anderegg, Tr. 798.) Over the past several years, demand has exceeded supply in the industry and "manufacturers have taken an independent attitude which has been an irritant to many existing and potential dealers." (BX 25Z-73.) Many existing marine dealers "are open to discussion to switch. This is due in part to availability problems, plus independent attitudes of manufacturers." (BX 25Z-77.) Mariner was able to gain 51 marine dealers, and had plans to have up to 300 after a short period of promotion. (Finding 148.) Distribution through marine dealers is necessary in the market for high horsepower outboards and is a barrier to entry (BX 12R), but, with time, a determined entrant can overcome this hurdle.

At the time of the point venture in 1972, Yamaha was capable of entering the relevant market.

While the subjective evidence in testimony and statements of the respondents for this litigation was to the effect that Yamaha was not considering entering the market on its own in the near future (Finding 192), the objective evidence of Yamaha's incentive and history of great interest in the market, as well as its growing capacity to overcome the technological barrier to entry, leads inexorably to the conclusion that it eventually would have

entered the United States market for high horsepower outboard motors.[29] Yamaha was therefore a potential future entrant. Given Yamaha's substantial financial strength (CX 114E, I) and history of successful market entry in the United States (Findings 176, 177), it is reasonable to conclude that the unilateral entry of Yamaha into the United States market for high horsepower outboards would offer a substantial likelihood of ultimately producing deconcentration of that market as well as other significant procompetitive effects.

3. Yamaha as a perceived entrant

Yamaha was not only a potential future entrant. The technical strength of its 25 h.p. outboard and the success of the motor in the European market caused a procompetitive market reaction by OMC. After seeing a test report on the Yamaha 25 h.p., and after seeing the impressive display of Yamaha outboards at the 1972 Tokyo Boat Show, OMC made "sizeable changes" in its own 25 h.p. outboard which "eventually wound up as virtually a new engine of larger piston displacement." (Finding 205.) OMC had no plans to upgrade the 25 h.p. engine until the Yamaha outboard came along. OMC's President testified as to the reason for the product improvement: "We had been stung by them abroad and we were very fearful of an invasion of the U.S. market." (Finding 206.)

The 1972 Tokyo Boat Show convinced OMC that several Japanese firms were potential entrants into the United States market. As a result, OMC started considering the projected effect on OMC's sales and earnings from such possible activity by Japanese outboard manufacturers.

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[29] There are no features of the high horsepower outboard market, not already discussed, which would make such entry infeasible. *United States* v. *Phillips Pet. Co.*, 367 F. Supp. 1226, 1247 (C.D. Cal. 1973).

Of all the outboard firms displaying their products at the 1972 Tokyo Boat Show, Yamaha was the most impressive to OMC. (Strang, Tr. 446.) OMC's President reported that Yamaha's display was the "biggest display in the place" and that he had seen the "new 25, 2-cylinder loop-scavenged ultra modern engine, quality and performance right on a par with anything we have in the U.S. (CX 107L-M.)

OMC is a competitor of respondents and opinions of OMC officials are "not necessarily the last word," *cf.*, *United States* v. *Falstaff*, *supra*, at pp. 534-36. But much of this evidence was not prepared for litigation and corroborated the credible testimony of Mr. Strang. In addition, it is supported by objective economic facts. I conclude, therefore, that it was reasonable for manufacturers of high horsepower outboards in this country in 1972 to believe, and that they in fact did perceive, that Yamaha was a potential competitor at the edge of the market. Furthermore, this perception had a procompetitive effect in the increased quality of OMC's 25 h.p. outboard, as well as in causing OMC and others to take a backward glance at Yamaha before making marketing decisions after the 1972 Tokyo Boat Show.[30]

H. Effects of the Joint Venture

Unlike a merger or acquisition, a joint venture can *add* to an industry a new decision-maker and additional production facilities. Unless the parties withdraw from the market because of the joint venture, then it may in fact add a procompetitive force. Determining the competitive effects of a joint venture alleged to violate Section 7 because potential competition has been eliminated, therefore,

[30] OMC apparently did not perceive that Mercury might increase its manufacturing facilities. (Strang, Tr. 340.)

requires a balancing of the procompetitive effects which might have occurred through the potential competition against the procompetitive effects which have occurred due to the entry of the joint venture into the market. Although Yamaha was a potential future entrant and was perceived as a potential competitor, those procompetitive effects must be compared to the procompetitive effects of the joint venture, which put a new entrant into the market and has enhanced Yamaha's potential as a future entrant.

In *Penn-Olin, supra,* the Court recognized that a joint venture may add a new competitive force to the market, and held that it is not controlled by the same criteria as a merger or conglomeration. 378 U.S. at 170. Since the Court found that the joint venture added a new firm to the market, the government on remand had to show that, but for the joint venture, one of the firms probably would have entered the market (thereby adding at least the competition added by the joint venture), plus that the other firm would have remained on the edge of the market, continually threatening to enter.[31]

Here, the joint venture has added to the market a new competitive force—Mariner outboard motors produced by Sanshin and sold by Mariner. These motors compete with many of the motors produced and sold by Mercury and others. In arguing that the joint venture violates § 7, complaint counsel assert that the transaction eliminated

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[31] Although Pennsalt was in the market and was replaced by the joint venture company, *id.* at 164, the cost of freight in shipping from its plant in Portland, Oregon, made it an ineffective competitor in the southeastern market. *United States* v. *Penn-Olin Chemical Co.*, 217 F. Supp. 110, 120-22 (D. Del. 1963). So the joint venture did, in effect, add a new competitive force to the market. Here, Mercury was in the market prior to the joint venture and remains in the market now. The joint venture here also added a new competitive force to the market.

the probability that Yamaha would enter the market in the future and stopped the present edge effect on competitors in the market who perceived Yamaha as a likely potential entrant.[32] But since the joint venture added a competitor to the market, complaint counsel have the burden of showing that the procompetitive effect of the potential competition provided by Yamaha prior to the joint venture was substantially greater than the actual entry of the new competitor, Mariner. See *Penn-Olin* on remand, *United States* v. *Penn-Olin Chemical Co.*, 246 F. Supp. 917, 919 (D. Del. 1965), *aff'd by an equally divided Court*, 389 U.S. 308 (1967).

In analyzing the competitive effects of the joint venture, I considered the subjective evidence (such as the testimony of officials of respondents and respondents' competitors, and the documents prepared with one eye on this litigation) as "biased commentary on the nature of the objective evidence" and as a "counterweight to weak or inconclusive objective data." *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 570 (1973) (Mr. Justice Marshall concurring). Evidence of what occurred after the joint venture agreement could not alone override all probabilities, but was considered as relevant in determining whether the transaction violates §7. *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *United States* v. *Phillips Pet. Co.*, 367 F. Supp., at p. 1260. This evidence was considered in the light of the main objective fact in this case, which is that the joint venture added to the relevant market a new procompetitive force—the Mariner line of outboard motors. In addition, the transaction had the following effects:

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[32] Although the theory was not alleged or developed, an anticompetitive effect of the joint venture could have been the elimination of additional production facilities and a second line of outboard motors by Mercury.

Yamaha has received substantial benefits from the joint venture. It has provided Yamaha with designing and manufacturing techniques for making high performance outboard motors, especially larger engines over 50 h.p. (Finding 189.) Six or eight Yamaha engineers came to Mercury's factory and lived there for several months in early 1973, so they could learn the technology required in making high horsepower outboards. They learned valuable proprietary know-how from Mercury's experienced engineers, which was not otherwise available. (Finding 195.) Mercury has continued this educational program, and Yamaha engineers continued in 1975 redesigning the outboards under the guidance of Mercury engineers. (Finding 193.)

The joint venture has saved Yamaha time in creating a line of outboards which are being marketed through marine dealers in the United States. The entry of the Mariner line was delayed in part due to spiraling inflation in Japan and the weakening of the dollar in relation to the yen. (Finding 147.) This economic difficulty changed the plan to have the joint venture selling outboards in the United States in early 1974.[33] (Finding 147.) Without the technology supplied through the joint venture, it would have taken two or three times as long, and several years would have passed, before Yamaha would have been able to build on its own the high horsepower outboards with the features needed for the United States market. (Findings 192, 194.) Yamaha certainly could not have been ready to enter the market by the beginning of 1974.

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[33] Entry of the Mariner line was also delayed pending the production of an outboard larger than 55 h.p., with Mercury finally supplying an 85 h.p. outboard for the 1976 entry of Mariner into the United States. Presumably this could have been done in 1974 but for the economic difficulty.

The 55 h.p. outboard made by Sanshin for Yamaha—its only true high horsepower outboard—was not ready for the United States market by 1974 even after receiving help from Mercury engineers. (Finding 170.)

Yamaha got valuable help from Mercury through the joint venture which, with the product rationalization from increased production, led to cost reduction in outboards produced by Sanshin. (Findings 189, 190, 193, 195.) Yamaha also probably avoided some field disasters and some massive recalls because mistakes are made when a firm plunges into a new market with untried products and "massive recalls hurt the image as well as cost money." (Finding 194.)

Moreover, the joint venture has allowed Yamaha to avoid the highly competitive market for low horsepower outboards in the United States (Finding 191) which has lower entry barriers and which would have been the natural access to high horsepower market. (CX 8A.) Yamaha recognizes the advantages it received from the joint venture: "Yamaha-Sanshin will be able to enter the U.S. market, whatever the brand name of . . . product may be." (CX 8B.)

Mercury's gains from the joint venture also had a procompetitive effect. When Mercury decided to have a second line, its production facilities had been unable to meet demands for Mercury outboards for several years. (Finding 133.) Mercury decided that it was not practical to build additional plant facilities because of the cost and time involved. (Findings 133-34.) It would have taken about five years for Mercury to provide the second line through plant expansion. (Finding 135.) When Mercury entered the joint venture, it planned to start marketing Mariner outboards in the United States in one and one-half

years (Finding 147), a saving of three and one-half years compared to internal expansion. Unforeseen world economic difficulties were in part the reason for the elimination of this procompetitive effect of the joint venture but it must be weighed in favor of the transaction.[34] In addition, Mercury has obtained valuable technical information from Yamaha through the joint venture. (Findings 141, 144-45.) A substantial present procompetitive effect of the joint venture is that there is another decision-maker in the oligopolistic United States market for high horsepower outboard motors. Mariner has joined the other three outboards, Johnson/Evinrude, Mercury and Chrysler, in this market. This entrant "adds new production capacity and has significant incentive to avoid the anticompetitive oligopolistic market practices in order to realize and expand a market share." *United States* v. *Black and Decker Mfg. Co., supra,* 1976 Trade Cases, at p. 69-572.

Most importantly, Mariner launched its entry by price competition. Mariner outboards have a retail price 5% to 8% lower than comparative outboards sold by OMC, Mercury and Chrysler. (Finding 150.) The Chairman of Mariner concluded in January of 1972, *before the joint venture was created,* that in order for the Mariner line successfully to compete in the United States market: "The product must have a price advantage." (CX 8F; see also BX 1F.) Mariner intends to price low enough to "get a

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[34] Another Mercury purpose for the joint venture was building a second line as a "fighting" brand to preempt the low horsepower market as an entry place for foreign competition. (Findings 131-32.) Because of higher costs than anticipated, this purpose was later abandoned to some extent, and rather than private label sales or distribution through mass merchandisers the Mariner line is being marketed solely through marine dealers. (Finding 149; BX1I.)

reading on the question of dumping." (CX 84A.) In other words, unless prohibited by the government under the anti-dumping regulations prohibiting territorial price discrimination on foreign-manufactured goods, Mariner intends to gain market share by engaging in substantial price competition.

The manufacturing of high horsepower outboard motors has high fixed costs. (Strang, Tr. 556.) In a high fixed cost industry, leading firms are prone to avoid price competition. *British Oxygen Co., Ltd., supra,* 1973-76 Trs. Bd., at p. 20,920. Here, the introduction of price competition through the Mariner line of outboard motors may very well have the "effect of shaking up established industry leaders [setting] in motion pressures on them to compete more vigorously in price or services in order to retain their existing market shares." *Ibid.*

Another procompetitive effect from the joint venture is that it has enhanced Yamaha as a potential future unilateral entrant. Both parties expect the joint venture to end in 1979. (Findings 196, 199.) Yamaha has obtained vital technical information from Mercury. At the end of the joint venture, Mariner dealers in the United States will be ideal distributors for Yamaha outboards, since they will have been selling identical engines, with only the decal and color different from Yamaha outboards. (Finding 198.)

Mercury has already decided to expand its production facilities to be able fully to provide the Mariner line by the end of the joint venture in 1979. (Finding 199.)

In summary, the joint venture has had the procompetitive effects of actually introducing a new line of outboards into the United States market with the promise of causing price competition, as well as enhancing the probability of an early unilateral entry by Yamaha into the market. Furthermore, after the joint venture is terminated, Mercury

will have a new second line, provided by its own additional production facilities.

These actual procompetitive effects, in my opinion, outweigh the loss of the effects by the temporary removal of Yamaha from the edge of the market. And since the joint venture has actually enhanced Yamaha as a future potential entrant, there has been no anticompetitive effect of the transaction in that regard.

IV. *Division of World Markets*

When the joint venture was first being organized, Mercury's proposal was that Mariner have the exclusive right to sell in North America, Europe and Australia; Yamaha would have the exclusive right to sell in Japan; and a marketing joint venture would sell in the rest of the world. (CX 16A.) There was some discussion in November 1971, in which Mercury advised Yamaha that Mercury was "looking for a Japanese partner with 2-cycle capabilities" and "would expect our partner to put his existing outboard business into the joint venture and not compete directly or indirectly with the joint venture." (CX 5A.) And in July 1972, one Mercury official expressed his opinion to another Mercury official that: "With respect to Europe, I believe that we should not attempt to market Mariner until that point in time that Yamaha has, in effect, pulled out of Europe. I don't think we want at anytime, a situation where Yamaha and Mariner are both in the same marketing area." (CX 16A.)

When the parties entered the joint venture agreement in November 1972, Article 8.4 of the agreement provided that, as to the products of Sanshin, Yamaha shall have the exclusive right to sell in Japan; Mariner shall have the exclusive right to sell in North America and Australia; and

a joint venture sales company would be formed to sell in the rest of the world. (CX 1K-L.)[35]

In subsequent discussions culminating in an amendment to the joint venture agreement in October 1973, the parties agreed that it was inappropriate to attempt to form a joint venture company for the marketing of Sanshin products, and, as a result, it was agreed that both Yamaha and Mariner are free to conduct their own marketing programs independent of each other in those territories which the joint venture agreement contemplated would be served by the joint venture sales company.[36] (CX 78A.)

The Senior Managing Director of Yamaha wrote to the President of Mercury in July 1973, requesting that (CX 76B):

> in establishing MMI [Mercury Marine International] sales network in the non-exclusive markets, you refrain from inviting Yamaha's existing distributors/dealers to join MI's sales network. Also, in order to avoid struggling with each other for new distributors/dealers by competing in the terms and conditions each party offers, we would like to propose to have as frequent meetings as possible.

In response, the President of Mercury, who was also Chairman of the Board of Mariner, replied in August 1973 (CX 77C):

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[35] Under Article 8.1, Yamaha, Mariner and the joint venture sales company were appointed the exclusive purchasers from Sanshin; under Article 10.1 Yamaha agreed not to make marine engines or buy them from other than Sanshin.

[36] The term "North America" as used in the joint venture agreement was defined to include Canada, the United States, and Mexico, with the exclusion for an arrangement between the government of Mexico and Yamaha for three fishing engines. Also, Yamaha agreed that Mariner would have the exclusive right to sell Sanshin products in New Zealand. (CX 78C.)

> We agree that we will not seek out Yamaha's distributors or dealers in the non-exclusive market but, in some area, such as Europe with its great number of subdealers, we may find dealers handling not only Yamaha and International's line but Mercury, OMC and other brands as well, in spite of our efforts to keep them separate. As a matter of good business, we recognize that, although we have separate marketing organizations, our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers.

This agreement was a qualification of competition by the parties to a joint venture agreement in one of the markets where the joint venture product would be sold.

Yamaha also agreed for the life of the joint venture, not to sell Yamaha brand outboards in New Zealand and Australia (where it had been handicapped by a 25% import duty, CX 15D), and Canada (where it ceased selling in 1972 or 1973, Eguchi, Tr. 664). And Yamaha agreed during the life of the joint venture not to enter Yamaha outboard motors any further in the markets in the United States and Mexico. Because it owns half of sales to Mariner, of course, Yamaha was not foregoing these markets completely.

The Supreme Court recognized in *United States* v. *Penn-Olin, Chemical Co.*, 378 U.S. 158, 168 (1964) that:

> Certainly the formation of the joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny.

Yet the Court did not rule that joint ventures are unlawful *per se*. The lessening of competition which naturally

occurs between the parties to the joint venture must be weighed against the increase in competition caused by the new entrant. *Id.* at 169-70.[37]

Here, when Yamaha requested that its established distributors in Europe be left alone, and when it agreed to the sale of Mariner products in lieu of Yamaha products in some markets, the restraint was reasonable in the context of the joint venture agreement. "If a joint venture or partnership is formed for the purpose of a lawful business enterprise and restraints result from the right to protect established business interests no violation of law occurs." *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd* 341 U.S. 593 (1951). Both *Timken* and *Penn-Olin* recognize that a joint venture between potential or actual competitors is different from a horizontal territorial division of markets having no purpose other than restraining competition. The rule of the *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972), is therefore inapplicable.

A. *Technical Assistance Agreement as a Division of Markets*

Mercury and Yamaha each entered into technical assistance agreements with Sanshin in accord with provisions of the joint venture agreement. These agreements provided that Mercury and Yamaha would disclose and license to Sanshin all Mercury and Yamaha patents and

---

[37] A conspiracy to divide markets, fix prices and eliminate competition cannot "hide from the effects of the law under the cloak of a joint venture." *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951). But "it is not illegal *per se* for competitors to combine their resources in a manufacturing joint venture to exploit a particular product or a particular market." *United States* v. *E. I du pont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1952), *aff'd*, 351 U.S. 377 (1956).

know-how applicable to making marine engines. (Finding 52.) Mercury and Yamaha also entered a technical assistance agreement between themselves pursuant to the joint venture. (Finding 48.) Complaint counsel attack provisions of this latter technical assistance agreement as violating Section 5 of the Federal Trade Commission Act. The specific provisions involved are: (1) Article 2.1 which is a cross licensing agreement, limiting the use of exchanged technical information to noncompeting goods, and (2) Article 6.7 whereby Mercury agreed not to manufacture any product competitive with those manufactured by Yamaha, except snowmobiles. (Finding 48.)

These provisions of the technical assistance agreement provide for a free flow of information between the parties to the joint venture, which may go directly to Mercury or Yamaha, or come to them through Sanshin. For example, snowmobiles, motorcycles and outboard motors all use two-cycle engines. Yamaha makes motorcycles and snowmobiles. Mercury makes snowmobiles and outboard motors. Article 2.1 does not prohibit Yamaha from using, in the production of motorcycle engines, information it obtains from Mercury concerning outboard motors. Article 2.1 does not prevent Mercury from using, in the production of outboard motors, information it obtains from Yamaha concerning motorcycles. Article 2.1 does prevent either Yamaha or Mercury from using, in the production of the snowmobiles, information gained from the other in the exchange of technical information meant to increase Sanshin's ability to produce better outboard motors.

Similarly, Article 6.7 prevents Mercury from gaining technical knowledge from Yamaha because of the joint venture relationship and using this information in starting to produce motorcycles or boats. Mercury had disposed of its boat manufacturing facilities prior to the joint venture after suffering heavy losses, and it has no

intention of manufacturing motorcycles. Therefore, the agreement has no adverse effect on competition.

A moderate competitive restraint in the cross license is lawful if respondents can show that the main purpose of the agreement serves a legitimate business objective and the restraint is ancillary to that purpose. *Standard Oil Co.* v. *United States*, 283 U.S. 163, 171 n.5 (1931) (Brandeis, J.) (a cross license involving patent improvements is frequently necessary if technical advancement is not to be blocked by threatened litigation); *In re Multidistrict Vehicle Air Pollution*, 367 F. Supp. 1298, 1303 n.7 (C.D. Cal. 1973) (cross licensing agreement in which parties agreed to withhold publication of development data and to withhold offering for public use developed devices for air pollution control except with the concurrence of all the parties); *United States* v. *E. I du Pont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1953), *aff'd on other grounds*, 351 U.S. 377 (1956) (territorial limitation ancillary to lawful transfer of trade secret).

Here, the restrictions in the cross license are reasonably related to the main purpose of the agreement—to provide for the free flow of technical information concerning the patents and know-how used in making outboard motors which can compete in the United States market. The restrictions are reasonable[38] and ancillary to the lawful purpose of the joint venture.

---

[38] Complaint counsel's main argument concerning the asserted lack of reasonableness of the restrictions in the cross license, was that technical information provided by Mercury pursuant to the agreement (CDI, jet prop exhaust, high pressure die casting, and lower unit design and styling) lacked value. This argument contradicts the finding that one of the barriers to entry to the United States market for outboard motors is technology and know-how, and is contrary to facts in the record.

ORDER

The joint venture agreement does not violate Section 7 of the Clayton Act. Although the complaint alleges that the joint venture violates Section 5 of the Federal Trade Commission Act, the proof offered under that statute related solely to the jurisdictional issue.[39]

Furthermore, the agreements not to compete, made pursuant to the joint venture, do not adversely affect competition, and are reasonable and ancillary to the lawful purpose of the joint venture.

The complaint must therefore be dismissed.

/s/ *James P. Timony*
James P. Timony
Administrative Law Judge

May 2, 1977

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[39] Since the theory of the case-in-chief was shaped to fit Section 7, the established concepts of that statute (rather than an additional standard introduced by Section 5) should control the substantive law involved in this proceeding. See *Perpetual Federal Savings & Loan Ass'n*, FTC Initial Decision, decided March 28, 1977, p. 19.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 80-1913

Brunswick Corporation, et al.,

Petitioners,

vs.

Federal Trade Commission,

Respondent.

Petition for Review of Order
of Federal Trade Commission

Filed: September 11, 1981

Before LAY, Chief Judge, ARNOLD, Circuit Judge; and BECKER, Senior District Judge.*

ORDER

The petition for rehearing and for rehearing en banc is denied. This court's opinion is modified as follows:

On page 28 of the slip opinion, paragraph X of the modified FTC order is changed to read as follows:

* WILLIAM H. BECKER, United States Senior District Judge, Western District of Missouri, sitting by designation.

X.

Nothing in this Order, including in particular Paragraphs IV or V hereof, shall prevent either Brunswick, Mariner, or Yamaha, respectively, from imposing upon itself, its dealers, or its distributors, ancillary vertical restraints in connection with the sale by it for resale in the United States of outboard motors.

The following new sentence should be added in text immediately thereafter:

Although Brunswick did not make the specific challenge to paragraph IV of the order that Yamaha made to paragraph V, we believe that it would be in the interests of justice to modify both paragraphs in the same way, so as to avoid giving either Yamaha or Brunswick an unfair advantage.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1760 September Term, 1980

Yamaha Motor Co., Ltd.,
Petitioner,

vs.

Federal Trade Commission,
Respondent.

No. 80-1913

Brunswick Corporation, et al,
Petitioners,

vs.

Federal Trade Commission,
Respondent.

Petitions for Review of an order of the Federal Trade Commission.

These causes came on to be heard on petition for review of an order of the Federal Trade Commission, appendix and briefs of the respective parties and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the Federal Trade Commission be, and it is hereby, modified in accordance with the opinion of this Court. The order of the Federal Trade Commission as modified is affirmed.

It is further ordered that one-half of respondent's costs shall be taxed against Brunswick and Mariner. Costs are not to be taxed against either Yamaha or respondent.

July 29, 1981

A True Copy:

ATTEST: */s/ (signature illegible)*

Clerk, U.S. Court of Appeals, Eighth Circuit
9/21/81

Opposition

1

Office - Supreme Court, U.S.
FILED
FEB 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BRUNSWICK CORPORATION and MARINER CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION and
YAMAHA MOTOR COMPANY, LIMITED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF ON BEHALF OF RESPONDENT YAMAHA MOTOR COMPANY, LIMITED IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

This case emanates from a nearly nine-year-old joint venture between two manufacturers of outboard marine engines, Brunswick Corporation ("Brunswick") and Yamaha Motor Company, Limited ("Yamaha").

In 1979, the Federal Trade Commission ("FTC") unanimously held that the joint venture, by which Brunswick acquired a 38% stock interest in Yamaha's outboard marine engine manufacturing facility, violated Section 7 of the Clayton Act and Section 5 of the FTC Act. The FTC ordered Brunswick to divest its stock to Yamaha. On review, the Eighth Circuit Court of Appeals unanimously upheld the FTC's decision that the joint venture violated Section 7 and Section 5, and also affirmed the FTC's Order requiring divestiture to Yamaha. Brunswick's petition to the Court raises the following questions:

1. Whether this Court need review (a) only one of the alternative theories—actual potential competition—relied on below in concluding that Section 7 was violated; and (b) the FTC's findings of fact, already deemed by the Eighth Circuit to be supported by substantial evidence?

2. Whether the FTC abused its discretion by ordering Brunswick, on terms contained in the joint venture agreement, to return to Yamaha control over Yamaha's sole source for outboard engines, thereby restoring Yamaha to its pre-joint venture competitive status?*

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* All of the parties to the proceeding are identified in the caption of this case. Petitioner Mariner is a wholly owned subsidiary of petitioner Brunswick. The two petitioners will be referred to as "Brunswick" in this brief. Pursuant to Rule 28.1 of the Rules of this Court, Respondent Yamaha Motor Company, Limited ("Yamaha") provides the following information. Yamaha has no parent. Nearly

---

40% of the stock of Yamaha Motor Co., Ltd. is owned by Nippon Gakki Co., Ltd. Yamaha has a wholly-owned subsidiary in the United States, Yamaha Motor Corp., U.S.A., and has the following principal subsidiaries and affiliates:

Sanshin Industries Co., Ltd.

Showa Works Co., Ltd.

Yamaha Body Industry Co., Ltd.

Yamaha Amakusa Manufacturing Co., Ltd.

Yamaha Tokyo Sales Co., Ltd.

Yamaha Sales Co., Ltd.

Yamaha Motor N.V.

Yamaha Marine France S.A.R.L.

Yamaha Motor Do Brasil Ltda.

P.T. Yamaha Indonesia Motor Manufacturing

H.L. Yamaha Motor Sdn. Bhd.

H.L. Yamaha Distributors Sdn. Bhd.

Yamaha Lanka Ltd.

Yamaha Parts Distributors Inc.

Yamaha Motor Canada Ltd.

Industria Mexicana De Equipo Marino, S.A. De C.V.

Yamaha International Corporation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1288

BRUNSWICK CORPORATION and MARINER CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION and
YAMAHA MOTOR COMPANY, LIMITED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF ON BEHALF OF RESPONDENT YAMAHA MOTOR COMPANY, LIMITED IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Yamaha respectfully prays that this Court deny Brunswick's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Yamaha's position, which varies from that of Brunswick, its joint venture partner, is understandable after consideration of the facts in the record below.

STATEMENT OF CASE

1. In 1972, Brunswick and Yamaha entered into a joint venture for the manufacture and marketing of outboard marine engines. At that time, both companies were among the world's leaders in the production and sale of

outboard marine engines, competing against each other throughout the world, except the United States and Canada (Pet. App. 2-3; 107-110). Although Yamaha was not selling outboard marine engines in the U.S. market in 1972, the FTC found, and the Eighth Circuit affirmed, that Yamaha was nonetheless exerting competitive force on that market (Pet. App. 127-128; 210-211, ¶ 205; 241; 12-13), that Yamaha was perceived to be the most likely entrant (Pet. App. 241; 192-193, ¶ 165; 207, ¶ 200; 211-212, ¶¶ 206-210; 13, n.8), and that actual entry by Yamaha was imminent (Pet. App. 53, ¶ 11; 118-127; 12-15).

Brunswick marketed under the "Mercury" label, while Yamaha employed the "Yamaha" brand name (Pet. App. 2-3). Brunswick's engine production facilities were located in Fond du Lac, Wisconsin (Pet. App. 64, ¶ 74; 146-147, ¶ 7). Sanshin Kogyo Company, Limited ("Sanshin"), of which Yamaha owned over 60% of the outstanding shares, produced Yamaha's engines (Pet. App. 3).

2. In proposing the joint venture to Yamaha, Brunswick's declared objective was to obtain another manufacturing source for a second brand of outboard marine engines in order to parallel the marketing strategies of its rival, Outboard Marine Corporation ("OMC"), which marketed under both the Johnson and Evinrude labels (Pet. App. 180-182, ¶¶ 128-132; 109-110; 99). In 1972, Brunswick and OMC shared over 72%, in units, and over 85%, in dollars, of the U.S. outboard market (Pet. App. 164-165, ¶¶ 78-79; 99). Brunswick targeted Yamaha as "the strongest joint venture partner among possible joint venture partners looked at by [Brunswick]" (Pet. App. 183-184, ¶ 138).

Yamaha's interests were twofold: (1) a new outlet for Sanshin production; and (2) acceleration of its existing program for manufacturing higher horsepower engines (Pet. App. 201, ¶ 189; 121-124).

3. Under the joint venture agreement, Brunswick acquired a 38% interest in Sanshin while Yamaha's interest was reduced to an equal 38% holding (the remaining 24% of Sanshin's stock is held by individuals) (Pet. App. 3; 153, ¶ 38). The agreement required that Sanshin's Articles of Incorporation be rewritten so as to circumscribe the company's activities and to require the approval of at least seven of the eleven directors prior to undertaking even routine corporate activity, *e.g.*, the design of a new outboard engine (Pet. App. 153, ¶ 40; 56-57, ¶¶ 28-31). By the agreement, Brunswick was guaranteed five directorships and, thus, veto power over the affairs of Sanshin (Pet. App. 57, ¶¶ 30-31). To fill these directorships, Brunswick nominated senior corporate officers responsible not only for the new "Mariner" brand engines, but for its established Mercury line (Pet. App. 55, ¶¶ 21, 23; 57, ¶¶ 31-32).

The agreement also confined Yamaha to Sanshin as its sole source of outboard marine engines; precluded Yamaha from entry into the North American markets; required Yamaha to withdraw from the Australian and New Zealand markets; and limited competition for existing dealers throughout the balance of the world (Pet. App. 19-20; 154-155, ¶¶ 43-45; 157-158, ¶ 53).

4. The initial term of the venture was ten years, but, absent timely termination notice, it would be renewed for three-year intervals in perpetuity (Pet. App. 154, ¶ 42; 4). The initial term expires in 1983 and, since Yamaha has given notice of termination, the production and marketing aspects of the venture will conclude at that time (Pet. App. 52, ¶ 2). However, Brunswick's 38% interest in Sanshin is unaffected by the termination (Pet. App. 21). Should the Order below be set aside, Brunswick will continue its ownership of the stock, and its possession of substantial control over Sanshin's affairs (Pet. App. 21-22; 32-34). The perpetual renewability of the agreement and, *a fortiori*, Brunswick's continuing

ownership of a 38% interest in Sanshin are at material variance with Brunswick's description of the joint venture as "limited-term" (Pet. 6). *See* pp. 10-11, *infra*.

5. Soon after the joint venture began, the FTC commenced an investigation and, in 1975, filed a Complaint challenging the venture under Section 7 of the Clayton Act (15 U.S.C. § 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) (Pet. App. 141-142). Although Brunswick took the lead in meeting the FTC's charges, Yamaha also defended the venture during the liability proceedings before the Administrative Law Judge ("ALJ") (Pet. App. 143). The initial record was closed in December 1976 (Pet. App. 144). Before the ALJ, Yamaha was represented by Arthur Katayama, Esquire, of the Los Angeles firm of Mori and Katayama (Pet. App. 141).

6. By 1977, it had become clear to all that Brunswick's stated objective in seeking the joint venture—the introduction of a second brand of engines—was accompanied by another motive: to prevent, or at least to forestall, Yamaha's entry into the U.S. market (Pet. App. 181-182, ¶ 132). Documents prepared by senior Brunswick officials and received in evidence before the ALJ plainly revealed this desire (*id.*). More significantly, Brunswick's directors on the Sanshin Board persistently blocked Yamaha proposals, thereby unmasking Brunswick's true objectives (Pet. App. 34; 55, ¶¶ 22-23; 57, ¶¶ 31-32).

Illustratively, while Article 10.2 of the joint venture agreement initially provided that Sanshin would supply *all* of Brunswick's "Mariner" brand engines (CX 1M, cited in part at Pet. App. 157-158, ¶ 53), Brunswick forced Yamaha to allow Mariner to source higher horsepower "Mariner" engines from Mercury's production facilities (CX 78, cited at Pet. App. 154-155, ¶ 44; Pet. App. 56, ¶ 26). This shift of manufacturing situs represented a material change in the venture, substantially

undermining Yamaha's realization of its own joint venture goal: the production and sale of higher horsepower engines (Pet. App. 201, ¶ 189). The United States was, and is, the largest market in the world for high horsepower outboard engines (Pet. App. 54, ¶ 20). Because the agreement already foreclosed Yamaha from direct entry into this market, Brunswick's subsequent diversion of manufacturing away from Sanshin foreclosed Yamaha from even indirect entry (*id.*).

On other occasions during the operation of the joint venture, Brunswick exercised its directors' votes to retard Yamaha's commercial success. For example, in December 1977, Brunswick refused to allow Sanshin to develop an eighty-five horsepower motor unless Yamaha agreed that Sanshin would not develop stern-drive engines, a major product of Brunswick (Pet. App. 55, ¶ 22). In 1980, after two years' equivocation on Yamaha's proposal that Sanshin be allowed to produce a 115-horsepower engine, Brunswick refused to approve the production unless Yamaha agreed, *inter alia*, to supply Mariner with engine parts for a full seven years after the joint venture's conclusion (Pet. App. 55, ¶ 23).

Contrary to petitioners' suggestion (Pet. 8), Brunswick's own conduct provides explanation, on the record, for Yamaha's disenchantment with the joint venture.

7. In 1977, and prior to oral argument before the Commission on appeal from the ALJ's initial decision, Mr. Katayama retired from the firm of Mori and Katayama. Mr. Jun Mori, who had had no prior association with the case, assumed responsibility for representing Yamaha (Pet. App. 80). On behalf of his client and to obtain background information, he had a brief meeting with Mr. Dolan, one of the FTC's Complaint Counsel. To describe that meeting as "ex parte" (Pet. 8) is misleading, for Mr. Dolan had no adjudicative responsibility in the case. Yamaha and Brunswick were both free to

meet privately with the prosecutor, as is any defendant or respondent in a multi-party proceeding.

8. On November 8, 1979, the Commission rendered its decision on liability (Pet. App. 95-136). It held that the joint venture violated both Section 7 and Section 5 and remanded to the ALJ for limited proceedings on relief. After this Commission decision, Yamaha engaged John R. Ferguson, then of the firm of Pettit & Martin, to represent it during subsequent proceedings (Pet. App. 81). Mr. Dolan's role in the retention of Mr. Ferguson was carefully reviewed by the FTC, which concluded that Mr. Dolan "provided no aid to Pettit & Martin in its representation of Yamaha in this proceeding" (Pet. App. 92). Moreover, Brunswick did not state, nor did the FTC discern, "how Mr. Dolan's conduct has itself affected the course of this proceeding in any way or how it has injured [Brunswick]" (*id.*). The Eighth Circuit found Brunswick's presentation of this issue to be utterly without merit (Pet. App. 8, n.5), and Brunswick has not raised the issue as one worthy of review in this Court (*See* "Questions Presented," Pet. i).

9. The FTC's Final Order, entered on August 14, 1980, provided, *inter alia*, that Brunswick divest its Sanshin holdings to Yamaha at a price equal to "the net tangible assets per share, computed and adjusted to the last day of the [accounting period] . . . immediately preceding the date of the sale" (Pet. App. 44, ¶ I). The "net tangible assets" formula prescribed was employed by Brunswick in its initial purchase (Pet. App. 58-59, ¶ 40; 61, ¶ 57), and is the identical formula provided in the joint venture agreement for voluntary and involuntary sales between the parties (Pet. App. 61, ¶ 57). Moreover, during the joint venture, Brunswick has received payments and dividends many times over its initial purchase price (Pet. App. 62, ¶ 59) and, under the Order, will receive at divestiture a sum that far exceeds its initial purchase price, representing Sanshin's capital appreciation (Pet.

App. 23-24).[1] Moreover, Brunswick retains the "Mariner" trade name and the Mariner dealer network (Pet. App. 42).

10. On review, the Eighth Circuit Court of Appeals modified certain prospective prophylactic aspects of the FTC's Order, but otherwise affirmed it (Pet. App. 27-28).

Addressing Brunswick's petition for review, the Eighth Circuit viewed its role as answering the "principal question [of] . . . whether the Federal Trade Commission had the support of substantial evidence on the record as a whole when it concluded, in the words of Section 7, that the effect of the joint venture 'may be substantially to lessen competition'" (Pet. App. 2). After a full review of the record, the Court answered that question in the affirmative: the record support for the FTC opinion was "substantial"; "ampl[e]"; and "easily found" (Pet. App. 13, 15).

REASONS FOR DENYING THE WRIT

I. THE PETITION IS AN INAPPROPRIATE VEHICLE FOR RESOLUTION OF THE "ACTUAL POTENTIAL COMPETITION" THEORY

A. The Petition Does Not Challenge All Independent Bases of Liability

Co-petitioners Brunswick and Mariner focus their request for review on that part of the decision below finding a violation of Section 7 under the so-called "actual potential competition" theory. The FTC's finding of a Section 7 violation is, in fact, also grounded on the elimi-

[1] As early as 1974, Brunswick acknowledged that the financial advantage to it from the joint venture was "conspicuous . . . in the [first] year and a half . . . 52% of [our purchase price] had been returned to Mariner . . ." (BX 1-X). Brunswick further characterized its purchase price as based on a "relatively low asset base. . . . The initial investment in Sanshin was comparatively small . . ." (BX 1-Z).

nation of *existing* competition (Pet. App. 127-128). The FTC opinion additionally embraces the "perceived" potential competition theory, declaring that that theory was subsumed in "the elimination of actual competition from the market" (Pet. App. 116-117). The opinion of the Court of Appeals for the Eighth Circuit leaves intact the FTC's independent grounds for the finding of a violation (Pet. App. 19).

More significantly, the Eighth Circuit opinion looks beyond the semantics of antitrust practitioners in observing that no "grandiose nomenclature" can supplant the precise language of Section 7 (Pet. App. 11, n.7). The unanimous Eighth Circuit finds a violation of Section 7, not by incantation of theorists' jargon, but by reference to the express language of the Clayton Act, holding that the FTC had substantial evidence for the conclusion that "there would probably have been more competition without the joint venture than with it" (*id.*).

Given the multi-dimensional nature of the decisions below, the granting of a writ to examine but one of the foundational theories would embark the Court on an exercise which, no matter how resolved, would not alter the ultimate outcome of the case. These circumstances suggest that the Court refrain from further review. *See, e.g., SS Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959) (writ of certiorari to address jurisdictional issue dismissed as improvidently granted in light of alternative basis for jurisdiction).

B. The Petition Invites Re-Examination of the Factual Bases for the FTC's Findings

Even if review of the actual potential competition theory were in order, close examination of the petition, and comparison of that petition with the decisions below, reveal that the petitioners' quarrels are primarily factual. Moreover, the petitioners' factual contentions are con-

trary to the FTC's findings which, after careful review, were deemed by the Eighth Circuit to have been "amply" supported by the evidence. Compare, for example, petitioners' assertion (Pet. 5) that "Yamaha's outboard motors were not suitable for the United States market," with the Eighth Circuit's conclusion that the FTC's contrary finding was fully supported (Pet. App. 12-13); petitioners' assertions (Pet. 7) that Yamaha "could not profitably enter and operate in the United States market" and (*id.*) that Yamaha lacked the technology and know-how essential to the production of suitable engines, with the Eighth Circuit's contrary conclusions (Pet. App. 12-16); and petitioners' assertion (Pet. 20) that Yamaha was but one of several foreign potential entrants, with the FTC's conclusion, based in part on Brunswick's own admission, that Yamaha was the only serious non-U.S. based manufacturer (Pet. App. 212, ¶ 210; 124-127; 241).

In short, Brunswick's petition requests that this Court review afresh the record below and reach factual conclusions contrary to those found by the FTC and endorsed by the Eighth Circuit. Brunswick's request for a factual review of the record is indispensable to its petition, since, to maintain its challenge to the actual potential competition theory, Brunswick must first obtain a reversal of numerous factual findings.

Brunswick's request for a factual review of the record encounters the established rule of this Court that, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Supreme Court review is particularly unnecessary where, as here, the Court of Appeals has already reviewed the adequacy of the administrative record. *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, 309 (1974) ("judicial review of Commission orders is primarily the task of the court of appeals. . . . The responsibility to assess the record to determine whether agency findings are supported by substantial evidence is not ours.").

II. PETITIONERS' REQUEST FOR REVIEW OF THE DIVESTITURE ORDER SHOULD BE REJECTED. DIVESTITURE TO YAMAHA IS ESSENTIAL; THERE IS NO "WINDFALL" TO YAMAHA

Brunswick's final issue seeks review of that part of the Order mandating divestiture to Yamaha of the 38% interest held in Sanshin. Brunswick's argument is three-pronged: no divestiture at all is required; if required, divestiture to Yamaha is unprecedented; and, even if to Yamaha, the divestiture price yields a windfall to Yamaha (Pet. 25-26). These contentions are unworthy of further review; indeed, they do not survive even cursory examination.

Brunswick's first contention, that no divestiture is required, falls on Brunswick's own admission (Pet. 25) that divestiture is the appropriate remedy in a Section 7 case. It argues, nonetheless, that it should be allowed to retain the Sanshin stock as an "investment" (*id.*). Brunswick's proven efforts to frustrate Yamaha's development of new engines and to block, or to forestall, Yamaha's entry into the United States belie any suggestion that Brunswick's continued 38% interest would be passive or purely for "investment" (Pet. App. 55, ¶¶ 22-23; 59-60, ¶¶ 41-53). Similar contentions involving even less control have been considered and rejected previously by this Court. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (23% interest). As the Eighth Circuit concluded, "The correctness of the Commission's action cannot be seriously questioned" (Pet. App. 21).

That, under the circumstances of this case, divestiture must be to Yamaha is equally correct. The thrust of the Order is, in the words of the FTC, to "restore Yamaha . . . as an actual and potential competitor with approximately that competitive vigor, independence and strength that it possessed in 1972" (Pet. App. 31). To allow divestiture to anyone else would seriously undermine this objective. Since Yamaha presently holds but 38% of

Sanshin, the ownership of an equal position by anyone else would not restore Yamaha to the control of Sanshin which it held in 1972 (Pet. App. 35). Moreover, the ownership of so substantial an interest is attended by "veto power" over the affairs of Sanshin, including any change in Sanshin's Articles of Incorporation (Pet. App. 59, ¶ 42); any change to authorized capital (*id.*, ¶¶ 44, 45); the manufacturing of new products (*id.*, ¶ 47); acquisitions (*id.*, ¶ 48); and the issuance of new shares (Pet. App. 60, ¶ 49). The stock ownership additionally allows access to potentially sensitive, competitive information (*id.*, ¶ 53).

Finally, Brunswick maintains that the asset value formula, prescribed to determine the stock price, would yield a "windfall" to Yamaha (Pet. ii). Brunswick advances not one fact to support this pejorative contention. The record proves the argument false.

The formula for determining the stock value is contained in the parties' own initial joint venture agreement (Pet. App. 61, ¶ 57; 44, ¶ I). Moreover, the price is fair to Brunswick, as it accounts for the appreciation in value of the Sanshin stock (Pet. App. 23). As noted above, *supra* n.1, Brunswick's own documents rebut a claim that the price is unfair.[2] In short, the price to be received by Brunswick for its stock is fair, and raises no issue worthy of this Court's review. *See, e.g.*, *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923) (This Court reviews an issue "of importance to the public as distinguished from that of the parties. . .").

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[2] Brunswick also maintains (Pet. 26) that the Order mandates an "outright gift" to Yamaha of Brunswick's technology and trade secrets. This is simply false. The Order has no effect on technology and trade secrets. Moreover, Brunswick has been paid millions of dollars under the joint venture for its technology and trade secrets (Pet. App. 62, ¶ 59). Finally, Brunswick will keep the Yamaha technology and trade secrets which have "substantially benefited" it (Pet. App. 61, ¶ 58).

CONCLUSION

Brunswick's petition, stripped of its inflammatory language and its often misleading characterization of the events below, presents no issue on which a writ of certiorari should issue. This protracted litigation should be brought to a close.

Yamaha respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Opposition

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No. 81-1288

In the Supreme Court of the United States

OCTOBER TERM, 1981

BRUNSWICK CORPORATION AND
MARINER CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly upheld the Federal Trade Commission's determination that a joint venture agreement "may * * * substantially lessen competition" within Section 7 of the Clayton Act when the agreement precluded the entry into a highly concentrated market of a firm which was otherwise likely to enter and was the only potential entrant, and the entry of which would have had significant procompetitive effects on the market.

2. Whether the Federal Trade Commission entered the proper remedial order in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 657 F.2d 971. The Commission's opinion on remedy (Pet. App. 29-42) and its final order (Pet. App. 43-46) are reported at 96 F.T.C. 151. The findings and recommendation of the administrative law judge on remedy (Pet. App. 47-77) are not reported. The Commission's opinion on liability (Pet. App. 95-136) and the initial decision of the Administrative Law Judge (Pet. App. 137-259) are reported at 94 F.T.C. 1179.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1981. A petition for rehearing was denied on September 11, 1981. On November 25, 1981, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including January 11, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Trade Commission found that a joint venture which petitioner Brunswick Corporation and respondent Yamaha Motor Company entered in November 1972 violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the United States market.

1. Under the joint venture agreement, Brunswick—a leading American manufacturer of outboard motors—was to acquire (through its subsidiary, petitioner Mariner Corporation) 38% of the stock of Sanshin Kogyo Co., Ltd., a corporation in which Yamaha was also to have a 38% interest (Pet. App. 3-4).[1] The agreement called for Sanshin to manufacture outboard motors, which Brunswick would have the exclusive right to sell, under the "Mariner"

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[1] Prior to the joint venture, Yamaha owned 60% of Sanshin's stock. Pursuant to the agreement, Yamaha's stock interest was reduced to 38%. Individual Japanese shareholders held the balance of the stock (Pet. App. 3, 153). Six of Sanshin's 11 directors were to be appointed by Yamaha and five by Brunswick, but certain important actions—approval of the budgets and expansion or discontinuance of a product line—required the concurrence of seven directors (*id.* at 110).

brand, in the United States and several other areas of the world. Yamaha had the exclusive right to sell Sanshin-produced motors in Japan. Ancillary agreements provided that Brunswick and Yamaha would limit competition between themselves in those areas of the world in which both parties were authorized to sell motors produced by Sanshin. Other ancillary agreements prohibited Yamaha from manufacturing, directly or indirectly, outboard motors similar to those manufactured by Sanshin, or from purchasing for resale (except in Japan) outboard motors manufactured by any third party, and prohibited Brunswick from manufacturing any product, except snowmobiles, competitive with products manufactured by Yamaha. The joint venture was to continue for a minimum term of 10 years, with automatic three-year renewal terms unless either party gave notice of termination (Pet. App. 110-111, 131, 134).

2. The Commission found that Brunswick is the second leading competitor in the highly concentrated United States outboard motor market. In 1973, four firms—Outboard Marine Corporation (OMC), Brunswick (through its "Mercury" brand), Chrysler, and Eska—accounted for 94.9% of the market measured by units sold and 98.6% by dollar volume (Pet. App. 99).[2] At the time of the joint venture agreement, profits in the industry had been high and sales had been increasing (*id.* at 5, 162-163). Nevertheless, prior to the agreement market shares had been stable (*id.* at 164-165); in the eight years before the agreement, several firms left the market and there was only one significant new entry, by acquisition of an existing firm (*id.* at 5, 163-164). Barriers to entry—

[2] Brunswick alone accounted for 22.6% of units sold and 26% of industry dollar volume (Pet. App. 2).

notably "capital costs, technology and know-how, and the need to develop a sales network"—were high (*id.* at 100). Petitioner Brunswick's own internal documents stated that "the oligopolistic nature of the * * * industry has offered some protection from smaller competitors" (Commission Exh. 71-1).

In 1972, Yamaha led the domestic Japanese outboard market with a 70% share (Pet. App. 197). It also sold outboard motors in every developed area of the world except the United States, in many areas in competition with Brunswick (*id.* at 108-109, 121). Yamaha was successfully marketing in the United States such related recreational motor products as motorcycles and snowmobiles (*id.* at 107); in 1972, exports to the United States accounted for 40% of Yamaha's total sales (*id.* at 3).

In 1968, Yamaha attempted to enter the United States market with a line of small, air-cooled, single-cylinder outboard motors (Pet. App. 108-109), which did not sell well, principally because United States customers preferred two-cylinder, water-cooled motors (*id.* at 109). But in 1969 Yamaha immediately began planning again to enter the United States market (*id.* at 122, 127), and in 1971 and 1972 it sold about 500 motors to Sears, Roebuck & Co. for resale under the "Sears" brand; when these motors "did not sell well at Sears because the quality and the price were too high for Sears' market" (*id.* at 109), Yamaha continued its plans to introduce a full range of motors into the United States (*id.* at 122; see *id.* at 109). The Commission found that "[b]y 1972, Yamaha was producing motors for sale of up to 25 [horsepower], enabling it *at that moment* to enter the U.S. at least through the low horsepower end of the market where substantial growth was occurring and substantial profits were available" (*id.*

at 125-126 (emphasis in original)).[3] In 1973, Yamaha "had concrete plans to enter the [United States] market" (*id.* at 121). These plans were "abandoned only when the joint venture alternative arose" (*ibid.*).

The Commission determined that the joint venture substantially lessened actual and potential competition (Pet. App. 95-136).[4] It found "[t]he record * * * unusually clear in this case * * * that Yamaha would have entered the U.S. outboard market * * * if the joint venture had been unavailable to it" (*id.* at 121) and that "Yamaha was the most likely potential entrant" (*id.* at 126-127). Moreover, "[i]ndependent entry by Yamaha would certainly have had a signifi-

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[3] OMC "was so impressed with the performance of Yamaha's 25 h.p. motor that it took steps to upgrade the quality of its own 25 h.p. motor" (Pet. App. 122).

[4] An administrative law judge had previously found that the United States outboard motor market was a "tight oligopoly" (Pet. App. 234) and that, but for the joint venture, Yamaha was a likely—indeed, "the most likely"—unilateral entrant into the market (*id.* at 241). But the ALJ recommended that the complaint be dismissed because he concluded that the anticompetitive effects of the joint venture were outweighed by procompetitive effects resulting from the addition of Mariner as a "new entrant" into the market (*id.* at 247) and the enhancement of Yamaha's potential for successful independent entry in the future (*id.* at 252). The Commission rejected the description of Mariner as a "new entrant," pointing out that Mariner was controlled by Brunswick (*id.* at 119), and found the conclusion that the joint venture would enhance the prospects for an early unilateral entry by Yamaha to be unsupported by the record (*id.* at 129-130). The final assessment of the evidence is, of course, for the Commission, not the ALJ. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-497 (1951).

cant procompetitive impact on this market" (*id.* at 126). The Commission found the record "again unusually clear that Yamaha had what it would take to sell outboard motors in the United States" (*id.* at 122). There was "little doubt that the technology was available to Yamaha to produce and sell in the United States—as it was then selling in other foreign markets—outboard motors suitable to compete effectively in this market" (*id.* at 108). In addition:

> Yamaha's management was experienced in producing and marketing outboard motors. Moreover, it was adept at marketing in remote areas. Not only were its outboards marketed virtually worldwide, but Yamaha's history of sales successes far from Japan, including the sale of motorcycles and snowmobiles in the United States, show the feasibility of Yamaha selling, servicing, and establishing dealership systems for its motorized products in the U.S.

Id. at 122. The Commission also found an "absence of evidence that other potential entrants were poised at the edge of the market" (*id.* at 127). In addition, the Commission found that the joint venture eliminated Yamaha's existing competitive effect on the United States firms (*id.* at 127-128).

After further proceedings on remedy (see Pet. App. 29-77), the court of appeals unanimously affirmed the Commission's order, modifying it in respects not in issue here (*id.* at 1-28, 260-261).[5]

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[5] The court modified the Commission's order to make it clear that Yamaha had been found in violation of Section 5 of the FTC Act, not Section 7 of the Clayton Act (Pet. App. 23), and modified two provisions of the Commission's order so that the order would not prohibit ancillary vertical restraints unrelated to those held unlawful in this case (*id.* at 25-27, 260-261).

The court sustained the Commission's determination that the joint venture had eliminated Yamaha as a likely potential entrant into the United States outboard motor market, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act (*id.* at 18-19). The court expressly ruled (*id.* at 18) that the Commission's findings met the standards set out by this Court in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 633 (1974).[6] The court upheld, as supported by substantial evidence, the Commission's finding that Yamaha had both the subjective intent and the capacity to enter the United States market (Pet. App. 12-13, 14). The court also sustained the Commission's finding that an independent entry by Yamaha would have had a significant procompetitive effect (*id.* at 15-16). The court agreed with the Commission that the anticompetitive effects of the joint venture were not outweighed by any procompetitive benefits (*id.* at 16-18) and that the ancillary agreements violated Section 5 of the FTC Act (*id.* at 19-20). The court found it unnecessary to address the Commission's determination that the joint venture had also eliminated the actual competitive effects of a perceived possible entry by Yamaha (*id.* at 19).

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[6] In *Marine Bancorporation*, the Court held that "[t]wo essential preconditions must exist" before the forestalling of an actual potential entry can be held to violate Section 7. First, the potential entrant must have "available feasible means for entering the [relevant] market" unilaterally; second, such a unilateral entry must "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." 418 U.S. at 633.

ARGUMENT

1. Section 7 of the Clayton Act, 15 U.S.C. 18, prohibits an acquisition of stock or assets "where * * * the effect of such acquisition may be substantially to lessen competition * * *." The Court has explained that the purpose of Section 7 is "to preserve and promote a free competitive economy" by "arrest[ing] incipient threats to competition" (*United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 170-171 (1964)). Particularly in highly concentrated markets, Section 7 is designed to prevent any substantial increase in concentration and "so preserv[e] the possibility of eventual deconcentration" (*United States* v. *Aluminum Co. of America*, 377 U.S. 271, 279 (1964), quoting *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 n.42 (1963)).

The Federal Trade Commission determined, on the basis of substantial evidence, that petitioners' acquisition forestalled the imminent entry of a firm—Yamaha—whose entry would have had significant competitive effects. In view of the language and purposes of Section 7, there is no reason to distinguish between this case and those cases—well established as violations of Section 7—in which an acquisition removes the procompetitive effects of a firm which has just begun to enter the market (see *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 659 (1964)) or removes the procompetitive effects of a threat to enter the market by a potential competitor (see, *e.g.*, *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973)).

Petitioners make the formalistic argument (Pet. 17-18) that if there was no less actual competition immediately after the challenged acquisition than

there was immediately before, the acquisition did not violate Section 7. But the only difference between petitioners' acquisition and the acquisition at issue in, for example, *United States* v. *El Paso Natural Gas Co., supra*—where the competitor eliminated by the acquisition had achieved a "degree of entry" into the market (*United States* v. *Marine Bancorporation, Inc., supra*, 418 U.S. at 624 n.24)—is that petitioners had the foresight to prevent their potential competitor from entering the market at all. It is implausible to suggest that because of this circumstance, petitioners' behavior should be immunized from scrutiny under Section 7, to determine whether the acquisition's "effect * * * may be substantially to lessen competition * * *." See *United States* v. *Penn-Olin Chemical Co., supra*, 378 U.S. at 170; V P. Areeda & D. Turner, *Antitrust Law* 74-76 (1980). See also Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 Yale L.J. 1, 40-52 (1977).[7]

Petitioners also suggest (*e.g.*, Pet. 16-17) that the elimination of an actual (as opposed to a merely perceived) potential entrant should not be considered a Section 7 violation because of the evidentiary diffi-

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[7] Petitioners assert (Pet. 18-19) that Section 7 did not bar the joint venture between Brunswick and Yamaha because it was a "limited-term" venture and was likely to have procompetitive effects. The Commission specifically rejected the argument that the joint venture had procompetitive effects sufficient to outweigh its anticompetitive impact (Pet. App. 129-130), and the court of appeals sustained the Commission's determination (*id.* at 16-17). Moreover, as the court of appeals noted, the agreement was "of indefinite length" and had a minimum duration of 10 years (*id.* at 16 & n.11). It was merely subject to termination by the parties, upon three years' notice, after that period (*id.* at 4)—a circumstance which, the Commission found (*id.* at 130), and the court of appeals agreed (*id.* at 16 & n.11), did not sufficiently mitigate its anticompetitive effects.

culties that such an approach would create. As the court of appeals recognized (*e.g.*, Pet. App. 11 n.7), however, any such difficulties can be resolved simply by applying the substantial evidence test to the Commission's findings. Moreover, petitioners have not shown that the inquiries undertaken by the Commission in this case differ significantly from those involved in other antitrust cases; determinations about the degree of competition in the market and about potential competitors' ability to enter the market are common in Section 7 cases (see, *e.g.*, *United States* v. *Marine Bancorporation, Inc.*, *supra*, 418 U.S. at 630-631; *United States* v. *Falstaff Brewing Corp.*, *supra*, 410 U.S. at 527-528; *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 579-581 (1967); *United States* v. *El Paso Natural Gas Co.*, *supra*, 376 U.S. at 660-661), and Yamaha's intentions were assessed through traditional evidentiary means, relying on both statements by the firm's employees and the firm's past behavior (see, *e.g.*, *FTC* v. *Procter & Gamble Co.*, *supra*, 386 U.S. at 580-581).[8] The Commission also—following this Court's mandate in *United States* v. *Marine Bancorporation, Inc.*, *supra*, 418 U.S. at 633—determined that if Yamaha's entry had not been forestalled by the joint venture, it would have "offer[ed] a substantial likelihood of ultimately producing deconcentration of [the] market or other significant procompetitive effects"; this Court has long recognized that Section 7 "requires not merely an ap-

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[8] See V P. Areeda & D. Turner, *supra*, at 107 ("Occasionally, the outside firm will take initial steps toward independent entry. Such objective evidence about the firm's subjective intention to enter can be very strong indeed. Without litigation bias, it can reveal final company plans with clarity.").

praisal of the immediate impact of [an acquisition] upon competition, but a prediction of its impact upon competitive conditions in the future * * *." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362 (1963). See also *FTC* v. *Procter & Gamble Co.*, *supra*, 386 U.S. at 577, 585; V P. Areeda & D. Turner, *supra*, at 116, 117 ("[T]he firm found to be a probable future entrant into [a] concentrated oligopoly market * * * would ordinarily improve competition.").

In any event, this is an inappropriate case in which to determine whether the Commission's approach presents unusual evidentiary problems. While no court of appeals has rejected the view that an acquisition which eliminates an actual potential entrant may violate Section 7,[9] this is the first case since *Marine Bancorporation* in which a court of appeals has found a violation on this theory. In other cases the factual findings were insufficient. See *Republic of Texas Corp.* v. *Board of Governors*, 649 F.2d 1026 (5th Cir. 1981); *Mercantile Texas Corp.* v. *Board of Governors*, 638 F.2d 1255 (5th Cir. 1981); *United States* v. *Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980); *BOC International Ltd.* v. *FTC*, 557 F.2d 24 (2d Cir. 1977); *FTC* v. *Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977). Consequently, the Court does not yet have before it the range of factual and evidentiary situations that should properly inform its judgment on problems of proof under the actual potential entrant theory.[10]

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[9] This Court has not yet had occasion to decide the issue. See *United States* v. *Marine Bancorporation, Inc.*, *supra*, 418 U.S. at 639; *United States* v. *Falstaff Brewing Corp.*, *supra*, 410 U.S. at 537-538.

[10] Similarly, the Commission found in this case that no other potential entrants were about to enter the market (see

2. Petitioners attempt to transmute their disagreements with the Commission's and the court of appeals' evaluation of the evidence into a conflict among the circuits (Pet. 19-24). For example, petitioners assert (*id.* at 20) that the Commission and the court of appeals "failed to consider the existence of numerous other firms" that might have entered the market. In fact, the Commission specifically found an "absence of evidence that other potential entrants were poised at the edge of the market" (Pet. App. 127).[11] Similarly, petitioners, while conceding—as of course they must—that "statements of top management" need not be "accepted at face value" (Pet. 22), assert that the court of appeals "took the position that [statements] by top management could be completely disregarded in favor of equivocal documents written by lower level Yamaha engineers" (*id.* at 21). In fact, the court of appeals specifically acknowledged that management officials' statements could be given significant weight (Pet. App. 14 n.9 ("If the ALJ were a District Court, we would be unable to say that his finding, based on

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page 12, *infra*); the Commission has consistently recognized that if there are many such entrants, the "elimination of any single company as a potential deconcentrator normally will have no significant anticompetitive effect." *Heublein, Inc.*, 96 F.T.C. 385, 589 (1980).

[11] The Commission has recognized the need to make such a finding in other cases as well. See page 12, note 10, *supra*. Petitioners attempt to invoke the recommendation of the administrative law judge in support of their point (see Pet. 20), but the ALJ specifically found that Yamaha was "a likely potential unilateral entrant * * * and in fact was the most likely potential entrant" (Pet. App. 241), and there is ample evidence in his recommendation alone to support the Commission's finding (see, *e.g.*, *id.* at 183-184, 242-243).

[management statements], was clearly erroneous.")). But the court concluded that such evidence in this case was not "strong enough" (*id.* at 15 n.9) to overcome Commission findings based on contradictory evidence. Petitioners' other assertions of a conflict among the circuits are simply explicit disagreements with the weight the Commission accorded to various kinds of evidence in deciding that Yamaha was likely to have entered the market (Pet. 22-24)[12] and that its entry would have had a significant procompetitive effect (*id.* at 22-23).[13]

3. The Commission's remedial order, which adopted the administrative law judge's recommended

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[12] For example, petitioners assert (Pet. 22-23) that the court of appeals' decision conflicts with such cases as *BOC International Ltd.* v. *FTC*, 557 F.2d 24 (2d Cir. 1977), because there was evidence only that Yamaha would eventually enter the outboard motor market. In fact, the Commission found—on the basis of Yamaha's behavior and capacities— that "Yamaha had concrete plans to enter the market by 1973, abandoned only when the joint venture alternative arose" (Pet. App. 121); the court of appeals expressly distinguished *BOC International* on the basis of this finding (Pet. App. 18 n.12).

[13] Petitioners also appear to suggest that the court of appeals erred in requiring the Commission to establish only that "Yamaha, absent the joint venture, [would] probably have entered" the outboard motor market (Pet. App. 11); petitioners seem to suggest that the Commission must find that a potential competitor was *certain* to have entered (see Pet. 23-24). But even apart from the general impossibility of establishing any fact about human behavior to a certainty, Section 7 applies to acquisitions that "may" impair competition, and the Court has declined "to read th[is] statutory requirement of reasonable probability into a requirement of certainty" (*United States* v. *Penn-Olin Chemical Co.*, *supra*, 378 U.S. at 175).

order with only minor modifications, required Brunswick to sell its 38% interest in Sanshin to Yamaha at " 'the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale' " (Pet. App. 37, quoting *id.* at 75 (recommended order of ALJ)). The court of appeals upheld all aspects of the order now challenged by petitioners (*id.* at 21-27).

The Commission's stated objective in formulating its remedy was to "restore Yamaha, to the extent possible, as an actual and potential competitor with approximately that competitive vigor, independence and strength that it possessed in 1972" (Pet. App. 31; see *id.* at 21). Petitioners do not appear to question the appropriateness of this objective, and they concede (Pet. 25) that "compete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7" (*United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961) (footnote omitted)).[14] Petitioners assert (Pet. 25) that they should not have been required to sell their Sanshin holdings to Yamaha; but Yamaha had been the majority stockholder of Sanshin before the joint ven-

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[14] Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), provides that if the Commission finds a violation of Section 7, it "shall issue * * * an order requiring [the] person [in violation] to cease and desist from such violations, and divest itself of the stock * * * in the manner and within the time fixed by said order." Moreover, in this case both the court of appeals and the Commission explained the need for divestiture. As the court said, "[e]ven without continued representation on Sanshin's governing board, Brunswick could exert considerable influence over the corporate policy of Sanshin, thus hindering the restoration of Yamaha as a potential competitor." Pet. App. 21. See *id.* at 32-35.

ture, and as the Commission explained (Pet. App. 35):

> Divestiture of Brunswick's Sanshin stock to any other buyer would not restore Yamaha to its pre-joint venture competitive position. Yamaha would be left with only a minority holding of Sanshin stock, and not the controlling position it held prior to the joint venture. Without majority control, Yamaha might be unable to enter or compete effectively in the U.S. outboard motor market.

Petitioners also challenged the price set by the Commission's order (Pet. 25-26). Notably, in the court of appeals, Yamaha unsuccessfully urged that this aspect of the order was too favorable to petitioners (Pet. App. 23-24). The Commission remarked that "[n]o easy answer exists" to the question of the proper price (*id.* at 37), but that since arm's length bargaining is impossible when a sale has been mandated, it would choose "the same [formula] used by the parties to determine the price Brunswick initially paid for the Sanshin stock" (*id.* at 37). Especially in view of the Commission's "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946)), the court of appeals was plainly correct in upholding the remedy (Pet. App. 22) on the ground that it has a "reasonable relation to the unlawful practices found to exist" (327 U.S. at 613; see also *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952)).[15]

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[15] Petitioners repeatedly refer to alleged misconduct by the Commission's former Complaint Counsel, but none of the questions presented comprises an issue related to any such misconduct, and petitioners do not explain how the allegations

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of misconduct are relevant to the questions presented. Petitioners presented these allegations to the Commission in a motion to disqualify Yamaha's counsel. The Commission rejected the allegations in a separate opinion (Pet. App. 78-94). The court of appeals summarily rejected petitioners' claim on this point (*id.* at 8 n.5).

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